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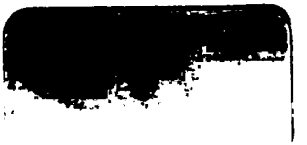

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OKLAHOMA REPORTS

VOLUME XXXIII

CASES DETERMINED

IN THE

SUPREME COURT

OF THE

State of Oklahoma

May 14, 1912—November 16, 1912

HOWARD PARKER, *State Reporter*

Warden Co., Oklahoma City

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OF THE

STATE OF OKLAHOMA

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R. L. WILLIAMS.....Justice
MATTHEW J. KANE.....Justice
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20.	JAMES B. CULLISON	Enid
20.	J. W. STEEN	Enid
21.	L. M. POE	Tulsa
22.	WADE S. STANFIELD	Sapulpa
23.	PRESTON S. DAVIS	Vinita
24.	R. H. HUDSON	Pawhuska
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26.	ROBT. M. RAINEY	Atoka

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HUETT, DANIEL	Garfield County, Enid
LINN, WILL	Grady County, Chickasha
OLDFIELD, EDW. D.	Oklahoma County, Oklahoma City
McCAIN, FARRAR L.	Muskogee County, Muskogee
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Hurt, E. S.----Madill
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Jordan, Clinton E.----Muskogee
Judge, Clayton P.----Idabel
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Kulp, Henry Victor----Norman
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OKLAHOMA CASES OVERRULED

Mayor, etc., City of Guthrie v. Ter. ex rel. Losey, 1 Okla. 188. See City of Guthrie v. New Vienna Bank, 4 Okla. 196.

Collier v. Territory, 2 Okla. 444. See Bettge v. Territory, 17 Okla. 85.

Brickner v. Sporleder, 3 Okla. 561. See Nix v. Gilmer, 5 Okla. 740; Johnson et al. v. Hays, 6 Okla. 582.

Pittman v. City of El Reno, 4 Okla. 638. See Oklahoma City v. Reed, 17 Okla. 518.

Cox v. United States, 5 Okla. 701. See Lincoln v. Territory, 8 Okla. 546.

Royce v. Territory, 5 Okla. 61. See Shivers v. Territory, 13 Okla. 466.

Keokuk Falls Imp. Co. et al. v. Kingsland & Douglas Mfg. Co. et al., 5 Okla. 32. See Janes v. Citizens' Bank, 9 Okla. 546; Willoughby, Receiver, v. J. E. Ball, 18 Okla. 535.

Blevins v. Morledge & Allen, 5 Okla. 141. See First Nat. Bk. v. Okla. Nat. Bk., 29 Okla. 427.

Wallace et al. v. Bullen et al., 6 Okla. 17. See Gray et al. v. Stiles et al., 6 Okla. 455.

Sowers v. Territory, 6 Okla. 436. See Brenton v. Territory, 15 Okla. 6; Harmon v. Territory, 15 Okla. 147.

Gray et al. v. Stiles et al., 6 Okla. 455. See Wallace v. Bullen, 6 Okla. 757. Bardrick et al. v. Dillon et al., 7 Okla. 535.

Wade v. Gould, 8 Okla. 690. See Barse Live Stock Co., v. McKinster, 10 Okla. 708.

Betts et al. v. Mills, 8 Okla. 351. See Holmes v. Holmes, 27 Okla. 140.

Greenville N. Bk. v. Evans-Snyder-Buell Co., 9 Okla. 353. See Frick Co. v. Oats et al., 20 Okla. 473; Garrison et al. v. Street & Harper Furniture & Carpet Co., 21 Okla. 643.

Rice v. West, 10 Okla. 1. See Richardson et al. v. Penny, 6 Okla. 328.

Mahaffey v. Territory, 11 Okla. 213. See Shivers v. Territory, 13 Okla. 473.

Powers v. Rude and C., R. I. & P. Ry. Co., 14 Okla. 381. See Snyder v. Stribling, 18 Okla. 168.

Buxton v. Alton-Dawson Merc. Co., 18 Okla. 287. See Spaulding v. Polley, 28 Okla. 764.

Block v. Pearson, 19 Okla. 422. See First Nat. Bk. v. Okla. Nat. Bk. 29 Okla. 427.

First N. Bk. of Hennessey v. Farquharson et al., 22 Okla. 27. See Smith-Premier T. Co. v. Grace, Sheriff, 28 Okla. 844.

Williams v. Steinmetz, 16 Okla. 104. See Holden v. Lynn, 30 Okla. 663.

Brown v. Yates, 24 Okla. 341. See Barnard v. Douglass-Whaley Gro. Co., 31 Okla. 124.

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AFFIRMED.

Smith v. Townsend, 1 Okla. 117; 148 U. S. 490.
Dunham v. Holloway, 3 Okla. 244; 170 U. S. 615.
Calhoun v. Violet, 4 Okla. 321; 173 U. S. 60.
Browning et al. v. DeFord, 8 Okla. 239; 178 U. S. 196.
Bockfinger v. Foster et al., 10 Okla. 488; 190 U. S. 116.
Queenan v. Territory, 11 Okla. 261; 190 U. S. 548.
Pryor et al. v. Bryan et al., 11 Okla. 357; 189 U. S. 325.
Pearce v. Territory, 11 Okla. 438; 118 Fed. 425.
Winebrenner v. Forney, 11 Okla. 565; 189 U. S. 148.
McMichael v. Murphy et al., 12 Okla. 155; 197 U. S. 304.
Hodges v. Colcord et al., 12 Okla. 313; 193 U. S. 192.
Estes v. Timmons, 12 Okla. 537; 199 U. S. 391.
Herd et al. v. United States, 13 Okla. 512; 146 Fed. 975.
Guss et al. v. Nelson, 14 Okla. 296; 200 U. S. 298.
Moran v. Territory, 14 Okla. 544; 203 U. S. 96.
Halsell et al. v. Renfrow et al., 14 Okla. 674; 202 U. S. 287.
McCalla v. Acker, 15 Okla. 52; 200 U. S. 613.
Nat. Live Stock Bank v. First N. Bank, Geneseo, 15 Okla. 194; 203 U. S. 296.
Bennett v. Bennett, 15 Okla. 286; 208 U. S. 50ß.
Southern Pine L. Co. v. Ward et al., 16 Okla. 131; 208 U. S. 126.
Bogard et al. v. Sweet et al., 17 Okla. 40; 209 U. S. 464.
Anderson et al. v. Shawnee Compress Co. et al., 17 Okla. 231; 209 U. S. 423.
Drumm-Flato Com. Co. v. Edmisson, 17 Okla. 344; 208 U. S. 534.
Waters-Pierce Oil Co. v. Deselms, 18 Okla. 107; 212 U. S. 159.
Snyder v. Stribling, 18 Okla. 168; 215 U. S. 261.
Wagg v. Herbert et al., 19 Okla. 526; 215 U. S. 546.
Williams v. First Nat. Bank of Pauls Valley, 20 Okla. 274; 216 U. S. 582, 54 L. Ed. 625.
C., R. I. & P. Ry. Co. v. Territory, 21 Okla. 334; 220 U. S. 302.
Noble State Bank v. Haskell, Governor, 22 Okla. 48; 219 U. S. 104.
Coyle v. Smith, 28 Okla. 121; 221 U. S. 559.

CASES REVERSED.

McDaid et al. v. Territory, 1 Okla. 92; 150 U. S. 209.
Gay et al. v. Thomas et al., 5 Okla. 1; 169 U. S. 264.
Cent. L. & T. Co. v. Campbell Com. Co., 5 Okla. 396; 173 U. S. 84.
Potts v. Hollon, 6 Okla. 696; 177 U. S. 365.
Romig et al. v. Gillett, 10 Okla. 186; 187 U. S. 111.
Potter v. Hall, 11 Okla. 173; 189 U. S. 292.
Sharp v. U. S., 13 Okla. 522; 138 Fed. 878.
Robinson v. Territory, 16 Okla. 241; 148 Fed. 830.
Beadles v. Smyser, Mayor, et al., 17 Okla. 162; 209 U. S. 693.
Western Inv. Co. et al. v. Tiger, 21 Okla. 630; 221 U. S. 286.
Gleason v. Wood, 28 Okla. 502; 224 U. S. 679.

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Choate v. Trapp, 28 Okla. 517; 224 U. S. 665.
English v. Richardson, 28 Okla. 408; 224 U. S. 680.

CASES DISMISSED.

Reaves et al. v. Oliver, 3 Okla. 62; 168 U. S. 704.
Sweet et al. v. Boyd et al., 6 Okla. 699; 20 Sup. Ct. Rep. 1019.
Paine v. Foster et al., 9 Okla. 213; 191 U. S. 562.
Comstock v. Eagleton, 11 Okla. 487; 196 U. S. 99.
Cunningham v. Morris, 12 Okla. 132; 194 U. S. 639.
New v. Territory, 12 Okla. 172; 195 U. S. 252.
McClung v. Penny, 12 Okla. 303; 191 U. S. 576.
Territory ex rel. Okla. Gas & Elec. Co. v. DeWolfe et al., 13 Okla. 454; 196 U. S. 643.
Barnes et al. v. Turner et al., 14 Okla. 284; 199 U. S. 611.
Lee et al. v. Ellis, 16 Okla. 24; 203 U. S. 601.
Gillett v. Romig et al., 17 Okla. 324; 205 U. S. 535.
C., O. & G. Ry. Co. v. Burgess et al., 21 Okla. 653; 219 U. S. 590.
State ex rel. Haskell, Governor, v. Huston, Judge, et al., 21 Okla 782; 215 U. S. 592.
Carleton v. Rushing, 26 Okla. 432; 32 Sup. Ct. Rep. 529.
Coalgate Company v. Hurst, 25 Okla. 588; 225 U. S. ——, 56 L. Ed 1262.

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INDIAN TERRITORY CASES OVERRULED

Shapleigh Hardware Co. v. Brittain, 2 Ind. T. 242. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.

Baldwin v. Ferris, 2 Ind. T. 438. See Lucas v. Garrett, 4 Ind. T. 55; M., K. &. T. Ry. Co. v. Phelps, 4 Ind. T. 706.

Morrow v. Burney, 2 Ind. T. 440. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.

Butler v. Penn, 3 Ind. T. 505. See Luce v. Garrett, 4 Ind. T. 55; M., K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706.

INDIAN TERRITORY CASES APPEALED TO THE CIRCUIT COURT OF APPEALS AND THE SUPREME COURT OF THE UNITED STATES.

AFFIRMED.

Badgett v. Johnston-Fife Hat Co., 1 Ind. T. 133; 85 Fed. 408.

Wilson v. Owens, 1 Ind. T. 163; 86 Fed. 571.

American Express Co. v. Lankford, 1 Ind. T. 233; 93 Fed. 380.

Swoffard Bros. Dry Goods Co. v. Smith-McCord Dry Goods Co., 1 Ind. T. 314; 85 Fed. 417.

Davenport v. Buffington, 1 Ind. T. 424; 97 Fed. 234.

Harless v. United States, 1 Ind. T. 447; 92 Fed. 353.

Dorrance v. McAlester, 1 Ind. T. 473; 91 Fed. 614.

Case v. Hall, 2 Ind. T. 8; 94 Fed. 300.

American Express Co. v. Lankford, 2 Ind. T. 18; 93 Fed. 380.

Robinson v. Belt, 2 Ind. T. 360; 100 Fed. 719.

Liverpool & London & Globe Ins. Co. v. Kearney, 2 Ind. T. 67; 94 Fed. 314.

Noyes v. Guy, 2 Ind. T. 205; 100 Fed. 555.

M., K. & T. Ry. Co. v. Truskett, 2 Ind. T. 633; 104 Fed. 728.

Chandler v. Rrtherford, 2 Ind. T. 379; 101 Fed. 774.

Fox v. Tyler, 3 Ind. T. 1; 109 Fed. 258.

Kimberlin v. Com. to Five Civilized Tribes, 3 Ind. T. 16; 104 Fed. 653.

Atoka Coal & Mining Co. et al. v. Adams et al., 3 Ind. T. 189; 104 Fed. 471.

Southwestern Coal & Imp. Co. v. McBride, 3 Ind. T. 223; 104 Fed. 1007.

Maxey et al. v. Wright, U. S. Ind. Insp., et al., 3 Ind. T. 243; 105 Fed. 1003.

Hardeman et al. v. Turner et al., 3 Ind. T. 338; 112 Fed. 41.

Rainwater-Bradford Hat Co. et al. v. McBride et al., 3 Ind. T. 621; 117 Fed. 597.

Ellis v. Fitzpatrick, 3 Ind. T. 656; 118 Fed. 430.

Muskogee Nat. Tel. Co. v. Hall et al., 4 Ind. T. 18; 118 Fed. 382.

Gentry v. Singleton, 4 Ind. T. 346; 128 Fed. 679.

Holford v. James et al., 4 Ind. T. 632; 136 Fed. 553.

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Sass & Crawford v. Thomas et al., 6 Ind. T. 60; 152 Fed. 627.
Capital Townsite Co. v. Fox et al., 6 Ind. T. 223; 152 Fed. 697.
Smith v. Armour Packing Co., 6 Ind. T. 479; 158 Fed. 86.
Choctaw, O. & G. R. Co. v. Bond, 6 Ind. T. 515; 160 Fed. 403-405.
Guarantee Gold Bond, Loan & Savings Co. v. Edwards et al., 7 Ind. T. 297; 164 Fed. 809.
Harper v. United States, 7 Ind. T. 437; 170 Fed. 386.
Hayes v. Barringer, 7 Ind. T. 697; 168 Fed. 221-222.

CASES REVERSED.

Chicago, R. I. & P. Ry. Co. v. Pounds, 1 Ind. T. 51; 82 Fed. 217.
Raymond v. Raymond, 1 Ind. T. 334; 83 Fed. 721.
Moffett-West Drug Co. v. Byrd, 1 Ind. T. 612; 92 Fed. 290.
Hargardine-McKittrick Dry Goods Co. v. Bradley, 1 Ind. T. 650; 96 Fed. 914-916.
Ranney-Alton Merc. Co. v. Mineral Belt Cons. Co., 2 Ind. T. 134; 104 Fed. 595.
McFadden v. Blocker, 2 Ind. T. 260; 105 Fed. 293-312.
Westchester Fire Ins. Co. v. Blackford, 2 Ind. T. 370; 101 Fed. 90.
Sangor v. Hibbard, 2 Ind. T. 547; 104 Fed. 455-457.
Shapard Grocery Co. et al. v. Hynes, 3 Ind. T. 74; 104 Fed. 449.
Foster et al. v. McAlester et al., 3 Ind. T. 307; 114 Fed. 145.
Swift & Co. v. Guy, 3 Ind. T. 756; 97 Fed. 443.
In re Estate of Geo. W. Taylor, 5 Ind. T. 219; 145 Fed. 169.
Stanclift v. United States, 5 Ind. T. 486; 139 Fed. 806.
Wilhite v. Skelton, 5 Ind. T. 621; 149 Fed. 67.
Gulf, C. & S. F. Ry. Co. v. Moseley, 6 Ind. T. 369; 161 Fed. 72.
M., K. & T. Ry. Co. v. Wilhoit, 6 Ind. T. 534; 160 Fed. 440-442.
Atoka Coal & Mining Co. v. Miller, 7 Ind. T. 104; 170 Fed. 584.

CASES DISMISSED.

Kelly et al. v. Johnson, 1 Ind. T. 184; 82 Fed. 1002.
G. W. Walker Trading Co. v. Grady Trading Co., 1 Ind. T. 191; 81 Fed. 1003.
Noble v. Worthy, 1 Ind. T. 458; 91 Fed. 1003.
Noble v. Worthy, 1 Ind. T. 523; 91 Fed. 1003.
McMillan v. McKee, 2 Ind. T. 529; 102 Fed. 1004.
Tynon et al. v. Crowell, 3 Ind. T. 346; 109 Fed. 1063.
Stephenson v. Osage Coal & Mining Co., 3 Ind. T. 567; 115 Fed. 1021.
Forsythe v. U. S. ex rel. Isperhecher, 3 Ind. T. 599; 115 Fed. 1019.
Binyon v. U. S., 4 Ind. T. 642; 195 U. S. 623.
Laurel Oil & Gas Co. v. Morrison et al. (not in Ind. T. Reports); 212 U. S. 291, 29 Sup. Ct. Rep. 395.

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THE

SUPREME COURT,

STATE OF OKLAHOMA

MAY TERM, 1912

PRESENT:

JOHN B. TURNER, CHIEF JUSTICE.
SAMUEL W. HAYES, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
MATTHEW J. KANE,
JESSE J. DUNN,
} JUSTICES.

McNARY *et al.* v. FARMERS' NAT. BANK.

No. 900. Opinion Filed May 14, 1912.

(124 Pac. 286.)

1. **BILLS AND NOTES — Indorsement — Sufficiency.** An indorsement on the back of a nonnegotiable promissory note, which reads: "For value received I hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of ——— per cent. per annum until paid. Waiving demand, notice of nonpayment and protest, as collateral"—signed by the payee, is sufficient to pass the title to the paper.

2. **PLEDGES—Assignment of Note as Collateral—Action by Pledgee.** Where the payee of a nonnegotiable promissory note assigns it to a third party as security for a loan, and pays the loan pending suit on the collateral, the holder may nevertheless recover on the collateral note from the maker, unless the latter is thereby deprived of some equity which he may have had against the payee.

(Syllabus by the Court.)

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Error from District Court, Pottawatomie County; A. H. Huston, Assigned Judge.

Action by the Farmers' National Bank against W. H. McNary and T. J. Folwell. Judgment for plaintiff, and defendants bring error. Affirmed.

T. G. Cutlip and *McLain Taylor*, for plaintiffs in error.

Blakeney & Maxey, for defendant in error.

TURNER, C. J. This is an action originally brought by the Farmers' National Bank of Tecumseh, defendant in error, against W. H. McNary and T. J. Folwell, plaintiffs in error, in the probate court of Pottawatomie county, on two certain promissory notes of $150 each, dated March 15, 1905, and made exhibits to the petition. Both were signed by defendants and made payable to M. H. Tennison, or order, on July 1, and August 1, 1905, who indorsed them to plaintiff thus:

"For value received I hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of———per cent. per annum until paid. Waiving demand, notice of nonpayment and protest, as collateral. [Signed] M. H. Tennison."

For answer Folwell, after general denial, admitted the execution of the notes and that they were indorsed as stated, but denied plaintiff to be the owner thereof. For answer McNary pleaded, among other things, a general denial. After reply filed, there was a trial to a jury and judgment for plaintiff in said court, and also, on trial anew, in the district court, to which the cause was appealed, and defendants bring the case here. To maintain the issues on its part, plaintiff proved by Tennison, the payee in the notes, that, before maturity and to secure present indebtedness and future advances, he had pledged said notes, then signed only by McNary, to the bank as collateral after indorsing them, presumably as stated in the petition, after which, for value, Folwell assumed their payment and signed them as principal, making McNary surety; and that the same were due and unpaid. On cross-examination he testified that at the time this

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suit was brought the bank had possession of the notes, but that at the time the witness was testifying the bank was not the owner or holder therefor, for the reason that pending the suit he (Tennison) had paid off his indebtedness to the bank for which the notes were pledged, whereupon they were delivered to him by the bank, and "that they were lost, I suppose in the court here; I don't know where they are"—and rested, whereupon defendants demurred to the evidence, which was overruled, after which both sides introduced other and additional evidence. When this is the state of the record, if, considering all the evidence, insufficient evidence was introduced to make out a case for plaintiff, the court erred in overruling said demurrer; otherwise not. *Meyer et al. v. White,* 27 Okla. 400, 112 Pac. 1005. Relying on *Doughty v. Funk,* 24 Okla. 312, 103 Pac. 634, where we said, in effect, that a failure by plaintiff to produce and introduce in evidence the notes sued on was fatal to a recovery, we are urged by defendants to sustain their demurrer because, they say, the notes sued on were not introduced in evidence, and hence there was not sufficient legal evidence upon which to predicate the judgment complained of. But after careful inspection of the record, we cannot say the notes were not in evidence. This for the reason that on page 100 and 101 of the record counsel for defendants offered copies thereof found among the files, whereupon the court said: "That is all part of the files in the case. Is there anything further, gentlemen?" Whereupon counsel for plaintiff said: "Yes, sir; I want to offer again the petition" (attached to which were copies of the notes and indorsements thereon). Whereupon the court said: "Well, they were offered, and they were all admitted in evidence." Showing that after being offered by both sides the cause was tried upon the theory that they were in, and as the court considered them in evidence when he passed upon this demurrer, we will do likewise.

Further in support of their demurrer, defendants contend that the bank is not the owner of the notes, and therefore not the real party in interest, because, they say, the indorsement on the notes was legally insufficient to carry the title thereto from

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Tennison to the bank. Not so. Precisely this contention was raised in *Robinson v. Lair,* 31 Iowa, 9. The court said:

"It is insisted that the writing on the back of the note, as follows: 'For value received, we guarantee the payment of the within note, and hereby waive demand, and notice of non-payment'—does not amount to an indorsement of the note, and does not express an intention to convey the title from payees to plaintiff. We confess ourselves unable to give effect to the contract of guaranty of payment, and waiver of demand and notice, if the payees still intend to retain the title. The writing simply constitutes an indorsement, with an enlarged liability."

In *Kellogg v. Douglas Co. Bank,* 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596, the indorsement read:

"For value received we hereby guarantee payment of within note at maturity, waiving demand, protest, and notice of protest. [Signed] M. D. Ewing, Cashier."

The court said:

"The indorsement to the Chemical National Bank was sufficient, it was placed on the back of the note, and, while it was a guaranty of payment, it was also an indorsement of the note. The guaranty itself would be senseless and wholly inoperative, unless the note was transferred by the payee to a third party. Such indorsements are not at all uncommon. * * * This was both a guaranty and an indorsement, which passed a full title to the note. 2 Daniel on Negotiable Instruments (4th Ed.) 1781; *Robinson v. Lair,* 31 Iowa, 9; *Heard v. Dubuque County Bank,* 8 Neb. 10 [30 Am. Rep. 811]."

See, also, *Judson v. Gookwin,* 37 Ill. 286; *Russell & Co. v. Klink,* 53 Mich. 161, 18 N. W. 627; *National Bank v. Haylen et al.,* 14 Neb. 480, 16 N. W. 754; *Mullen v. Jones,* 102 Minn. 72, 112 N. W. 1048; *German American Savings Bank v. Hanna, Ex., et al.,* 124 Iowa, 374, 100 N. W. 57; *Dunham v. Peterson et al.,* 5 N. D. 414, 67 N. W. 293, 36 L. R. A. 232, 57 Am. St. Rep. 556; *Elgin City, etc., v. Zelch,* 57 Minn. 487, 59 N. W. 544; *Childs, Junior, v. Davidson,* 38 Ill. 437; *South Bend Iron Works v. Paddock,* 37 Kan. 510, 15 Pac. 574; *Pattee Plow Co. v. Beard,* 27 Okla. 239, 110 Pac. 752, 4 Am. & Eng. Enc. Law, p. 256; Comp. Laws 1909, sec. 5559.

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The notes were originally given by McNary to Tennison in payment for some ice which was sold, after the pledge of the notes to the bank, by McNary to Folwell, who assumed the debt as stated. Recognizing the doctrine that these notes were pledged by Tennison to the bank as collateral to a debt due the latter and were nonnegotiable and subject to the equities existing between the original parties, the court permitted defendants to plead and introduce testimony resisting payment on the ground that the notes were procured by fraud in the sale of the quantity and quality of the ice. On this issue the jury found in favor of the bank, and upon the refusal of the court to sustain defendants' demurrer to the evidence, returned a verdict for the bank for the full amount of the notes including interest, and that, too, in the face of the uncontradicted testimony that the bank had been paid its debt to secure which the notes were pledged as collateral.

In support of their same assignment, defendants contend that in view of the fact that its debt had been paid, the bank was entitled to recover nothing, and that said motion should have been sustained. Again not so.

Logan v. Cassell, 88 Pa. 288, 32 Am. Rep. 453, was assumpsit by Logan against Cassell on two promissory notes made by defendant to the order of one Conner and by him indorsed in blank to the plaintiff as collateral security for a loan. The court said:

"It is true the court charged that, if the plaintiff purchased the notes, he could recover their full amount; but, if he held them as collateral, he could recover only the amount due him on the original debt. So far as this goes, it was correct under the authority of *Appleton v. Donaldson,* 3 Pa. 381. But those two questions both found against the plaintiff were insufficient to defeat a recovery against the defendant. The plaintiff having obtained the notes in good faith, he might maintain an action on them in his own name, although the right of property therein had again passed to the payee. Whether the plaintiff sued for himself, or as trustee for the payee, constituted no defense for the maker, unless he was thereby deprived of some equitable defense which he may have had as against the payee. 2 Pars. on Notes & Bills, 437; *Whitefore v. Burckmyer,* 1 Gill [Md.] 127 [39 Am. Dec. 640]; *Mauran v. Lamb,* 7 Cow. [N. Y.] 174;

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Dean v. Hewitt, 5 Wend. [N. Y.] 257; *Brown v. Clark,* 14 Pa. 469; *Pearce v. Austin,* 4 Whart. 489 [34 Am. Dec. 523]; *Holmes v. Paul,* 6 Am. Law Reg. 482; *Ballentine v. McGeagh,* 4 Brewst. 96; *Way v. Richardson,* 3 Gray [Mass.] 412, [63 Am. Dec. 760]. Hence, although the notes were taken by the plaintiff as collateral, and he had been fully paid the debt for which they were pledged, so that he had no right of property therein as against the payee; yet, still the plaintiff was entitled to recover unless the defendant had fully paid them to the payee. It therefore follows the learned judge erred in instructing the jury that, if the notes were held as collateral, the plaintiff could recover only the amount he showed to be due on the original debt, without adding that they must also find the defendant had paid the excess due from him on the notes to the payee."

In *Green v. McAuley,* 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308, the court cites this case with approval and in support of the doctrine. 2 Daniel on Neg. Inst., sec. 1192, and 3 Randolf, Com. Paper, sec. 1465.

In *First Nat. Bk. v. Mann,* 94 Tenn. 17, 27 S. W. 1015, 27 L. R. A. 565, the court said:

"There is another feature in the case that it is material to mention. It appears from the proof that pending this litigation the debts due the bank and Wolfe have been paid, for which this note was pledged as collateral, and neither the bank nor Wolfe has now any interest in the recovery. Still, under the law, notwithstanding the principal debt has been paid pending suit on the collateral, such suit may properly continue to judgment, and, if the holder collect the same, he will hold it as trustee for the benefit of the debtor; that is, the owner of the collateral. Jones, Pledges, sec. 664; *Logan v. Cassell,* 88 Pa. 288, 32 Am. Rep. 453. But this is only when the maker will not be thereby deprived of some equitable defense he might have against the payee; or, in other words, the holder can only recover subject to the equities of the maker against the payee. *Logan v. Cassell, supra,* 2 Pars. Notes & B. 437; *Pearce v. Austin,* 4 Whart. 489, 34 Am. Dec. 523."

There was no reason for the suit to abate by the transfer of interest in the note, occasioned by its payment, from the pledgee to Tennison. If by its own vigor it might not of right continue, such it could do by reason of Comp. Laws 1909, sec. 5572; and such was the holding of the court.

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As the next error is alleged to be the admission in evidence, over objection, of the record in a certain suit wherein McNary sued Tennison in damages alleging fraud in the sale of this same ice, and wherein it is said he failed to recover, for the reason that said evidence is not attempted to be abstracted, as required by rule of court, we refuse to consider it, especially as an attempt to do so on our part might prove futile, since we are referred to the pages of the record for the record in that case which we find contain no journal entry. Neither, for failure to comply with said rule, will we consider whether the court erred in certain instructions to the jury.

Finding no error, the judgment of the lower court is affirmed.

HAYES and KANE, JJ., concur; WILLIAMS and DUNN, JJ., absent, and not participating.

FIDELITY & DEPOSIT CO. OF MARYLAND v. RANKIN.

No. 1277. Opinion Filed May 14, 1912.

(124 Pac. 71.)

1. **BANKS AND BANKING—Trust Funds—Application to Debt to the Bank.** A depositor, having an account with a bank in which he deposited trust funds, drew his check as trustee thereon to pay his private debt to the banker. The banker, with knowledge of the trust, concurred with the depositor in the appropriation by the depositor of the trust in order to pay an individual claim held against him by the bank. **Held,** that the bank acquires no title to said funds as against the true owner.

2. **TRUSTS—Mingling Trust Funds.** If a party mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies to money deposited in banks.

3. **SAME—Misapplication.** Where a person holding money in a fiduciary capacity pays or transfers it to a bank with notice of his relation to it, for a purpose foreign to the trust, the bank cannot hold the money as against the true owner.

(a) An action to recover same will lie in favor of the true owner as against the party to whom the trust fund was transferred contrary to the trust.

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4. **CLERKS OF COURTS—Custody of Funds—Trust—What Constitutes.** A United States Court clerk receiving moneys by virtue of his office holds the same in trust.

5. **COURTS—Decisions—Controlling Effect.** As to cases pending in the territorial courts in Indian Territory and Oklahoma Territory at the time of the erection of the state, the decisions of the Supreme Court of the United States are controlling.

(Syllabus by the Court.)

Error from District Court, Logan County;
A. H. Huston, Judge.

Action by the Fidelity & Deposit Company of Maryalnd against George C. Rankin, receiver of the Capitol National Bank of Guthrie. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Devereux & Hildreth, for plaintiff in error.

Flynn, Ames & Chambers, for defendant in error.

WILLIAMS, J. The plaintiff in error was surety upon the bond of T. A. Neal, clerk of the United States Court for the First Judicial District of Oklahoma Territory. The funds that he received as such clerk were deposited by him in the Capitol National Bank, at Guthrie, Okla., in his name as clerk of said court. He was indebted individually to said bank in a certain sum, which was discharged by his giving said bank a check on said fund deposited by him as clerk of said court; said check being drawn by him as said clerk. It was alleged that said bank applied said check against said fund, with the knowledge that said funds were trust funds held by him in the capacity of such clerk, and that the plaintiff in error as his official surety was required according to law to pay a defalcation in a certain sum, and an action was commenced by the plaintiff in error, as plaintiff, against the receiver of the Capitol National Bank, to recover said trust fund, and this proceeding in error is to review the judgment of the trial court, which, without the intervention of a jury, was a general finding in favor of the defendant.

In *Howard v. United States,* 184 U. S. 676, at page 683, 22 Sup. Ct. 343, at page 546, 46 L. Ed. 754, which was an

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action on a clerk's bond, brought by an individual who had paid money into court, it is said:

"But it is suggested that, in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words that a clerk may receive money brought into court for the purposes of pending suit. But it is clear that Henry county was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law. No one has ever supposed that a judge was under obligation to perform such services. Who, then, was to receive the money? Plainly it was the duty of the clerk, who was the arm of the court, kept its records showing money paid in by suitors or officers, and was under bond conditioned that he would faithfully perform all the duties of his office. He was allowed by statute a commission 'for receiving, keeping and paying out money in pursuance of any statute or order of court.' Rev. Stat. 828 [U. S. Comp. St. 1901, p. 635]. It was well said by Judge Caldwell, delivering the unanimous judgment of the Circuit Court of Appeals, that 'for more than a century the clerks of the Circuit Courts of the United States have been receiving and paying out moneys of suitors in those courts in the usual and ordinary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks.'"

This case was pending in the trial court at the time of the erection of the state, and *Howard v. United States, supra,* was binding on the trial court. *Moore v. A., T. & S. F. Ry. Co.,* 26 Okla. 682, 110 Pac. 1059; *Chicago, R. I. & P. Ry. Co. v. Newburn,* 27 Okla. 9, 110 Pac. 1065, 30 L. R. A. (N. S.) 432.

The averment in the petition is that the funds deposited in the Capitol National Bank to the credit of T. A. Neal, clerk, "were all trust funds, and that none of said funds were the individual property of said Neal," and "that said Capitol National Bank had notice and knowledge that the funds so deposited by said Neal in said bank to his credit as clerk of said district court were trust funds for which said Neal was accountable as

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such clerk." It is averred that Neal paid his individual note for $1,000 by his check drawn on his trust fund, and which said check was signed by him as clerk; that said bank, at the time said check was given and at the time same was applied to the payment of said note, had notice and full knowledge that said Neal was using said trust funds for that purpose.

It is next averred that plaintiff in error, as his surety, some four years afterwards, "was obliged to pay and did pay the sum of $35,000 in order to indemnify the parties to whom said Neal was indebted as such clerk and to discharge its liability on said bond." The answer denied each of these averments.

C. H. Griswold testified that he was clerk of the district court of Logan county at the time of giving his testimony; that Neal was appointed clerk on October 7, 1901, and acted until the 4th or 5th day of May, 1905, and that during that time he was a deputy clerk, between 1901 and the spring of 1903, and copies of the bonds executed by the plaintiff in error were produced by him and introduced in evidence. He also testified that Neal had drawn a great many checks on the Capitol National Bank. Later, as a witness for the defendant, he testified that Neal deposited to his credit as clerk his fees and compensation for services, as well as the other funds; that he was in the habit of checking against this account as clerk for his personal use all the time; that his fees amounted to at least $7,000 a year. The record shows the official shortage and the payment by plaintiff in error of a sum in excess of the amount sued for.

L. H. Selsor, a witness for the plaintiff, testified that he was clerk of the receiver and in possession of the books of the bank, and that these books showed that Neal had executed a note to the bank for $1,000, dated April 3, 1902, which was paid by the check of Neal as clerk on August 4, 1902, and that on that date Neal executed another note for $1,000, which was paid by his check as clerk on January 2, 1903. On cross-examination Mr. Selsor testified that he did not know whether the money that was credited to Neal as clerk was a personal fund or a trust fund.

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In *Central National Bank v. Connecticut Mutual Ins. Co.*, 104 U. S. 54, 26 L. Ed. 693, the agent of said company opened an account with the bank as agent, but not designating for whom. The officers of the bank, however, knew that he was the agent of the Connecticut Mutual Insurance Company. The agent became indebted individually to the bank. When such indebtedness matured, he had a large balance to his credit as agent. The bank having charged the notes up against this account, the insurance company brought a suit in equity to charge the bank. The syllabus of the case is in part as follows:

"(2) The bank contracts that it will pay the money on his checks, and, when they are drawn in proper form, it is bound to presume, in case the account is kept with him as trustee, or as acting in some other fiduciary character, that he is in the course of lawfully performing his duty, and to honor them accordingly; but, when against such an account it seeks to assert its lien for an obligation which it knows was incurred for his private benefit, it must be held as having notice that the fund is not his individual property, if it is shown to consist, in whole or in part, of money which he held in trust relation.

"(3) As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property. * * *"

"(5) When a bank account was opened in the name of a depositor, as general agent, and it was known to the bank that he was the agent of an insurance company, that conducting its agency was his chief business, that the account was opened to facilitate this business, and used as a means of accumulating the premiums on policies collected by him for the company, and of making payment to it by checks, the bank is chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use. The company may enforce, by bill in equity, its beneficial ownership therein against the bank, claiming a lien thereon for a debt due to it, which he contracted for his individual use."

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In the opinion the court said:

"In the case of *Pannell v. Hurley,* 2 Col. C. C. 241, the depositor, having two accounts, one in trust, and the other in his own name, drew his check as trustee to pay his private debt to the banker. The Vice Chancellor, Knight Bruce, put the case thus: 'Money is due from A. to B., in trust for C. B. is indebted to A. on his own account. A., with knowledge of the trust, concurs with B. in setting one debt against the other, which is done without C.'s consent. Can it be a question in equity whether such a transaction stand? In *Bodenham v. Hoskyns,* 2 De G., M. & G. 903, the principal was stated to be one, acted upon daily by the courts of equity, 'according to which a person who knows another to have in his hand or under his control moneys belonging to a third person cannot deal with those moneys for his own private benefit when the effect of that transaction is the commission of a fraud upon the owner."

In *Farmers' & Merchants' Bank v. Farwell,* 58 Fed. 633, 7 C. C. A. 391, it is said:

"He [a depositor] cannot by depositing moneys of others intrusted to his care pay his own debt to the bank, or enable the bank to do so. In the absence of fraud or gross negligence on the part of the third parties, the bank has no higher right or better title to their money intrusted to its depositor than the depositor has himself. It is meant here by the rule that equity will follow moneys held in a fiduciary capacity as far as they can be identified, and restore them to the beneficial owner of them. If they are deposited in the bank by a trustee, agent, factor, or bailee, even if they are mingled with his own money they do not become his property, and the bank stands in the shoes of its depositor. It must pay the money to its true owner."

See, also, *Union Stockyards Bank v. Gillespie,* 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Havannah Central Ry. Co. v. Knickerbocker Trust Co.,* 135 App. Div. 313, 119 N. Y. Supp. 1035; *Gerard v. McCormick,* 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *Ward v. City Trust Co.,* 192 N. Y. 61, 84 N. E. 585; *Van Alen v. American National Bank,* 52 N. Y. 1; *Commercial Bank v. Jones,* 18 Tex. 811; *Honig v. Pacific Bank,* 73 Cal. 464, 15 Pac. 58; *Burtnett v. Bank,* 38 Mich. 630; *Cady v. South Omaha National Bank,* 46 Neb. 756, 65 N. W. 906; *Rock Springs Nat. Bank v. Luman,* 6 Wyo. 123, 42 Pac. 874; *Town of East Hartford v. American Nat. Bank,* 49 Conn. 539; *Johnson*

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v. Bank, 56 Mo. App. 257; *Clark v. First National Bank*, 57 Mo. App. 277.

It follows that the judgment of the lower court will be reversed and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

JONES, *Mayor, et al.* v. WHITAKER *et al.*

No. 1477. Opinion Filed May 14, 1912.

(124 Pac. 312.)

1. **MUNICIPAL CORPORATIONS—Public Improvements—Contracts—Statutory Provisions.** Under a statute authorizing a municipal corporation to "provide for" the extension or construction of collateral sewers and which provides that the "actual cost of labor and material expended" in constructing such lateral does not limit the city council to the extension or construction of the work by the employment of laborers, or by permission of the respective lot owners to do the work themselves along and in front of their lots respectively, but authorizes the city council to provide for such construction, by the making of a contract for the construction of the work as a whole, as was done in this case.

2. **SAME—Assessments—Apportionment.** While the authority of the city council to "apportion" a levy to various lots might, in the absence of a special direction, be regarded as a direction to apportion such levy equally, yet such inference or rule cannot be sustained in the presence of an express provision of the statute that the apportionment shall be made "according to the actual cost of labor or material expended in constructing such lateral along the lot assessed."

3. **SAME—Injunction.** It is the general law that no one will be entitled to relief in equity to enjoin the collection of an assessment until he shall have shown that he meant to do equity by paying that portion of the tax assessed against him as it can be clearly seen that he ought to pay; and the owner of the property will not be permitted to refuse the payment of a total assessment where it is clear that he ought to pay a part, and where it can be seen what that part is.

4. **SAME.** But this rule has no application to a case like the present, where the entire tax fails by reason of an illegal assessment, and in such a case the assessment may be enjoined without the

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payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due.

5. **SAME—Contract—Ordinance.** A statute delegating certain powers to a municipality to make a certain improvement, and stipulating therein that the municipality shall provide for such improvement by an ordinance, the municipality may not provide for the same by a resolution.

(a) The question of estoppel does not arise under this record.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by James Whitaker and others against C. G. Jones, as Mayor of Oklahoma City, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

John H. Shirk, for plaintiffs in error.

Shartel, Keaton & Wells, for defendants in error.

WILLIAMS, J. On June 12, 1901, the mayor and city councilmen of the city of Oklahoma City, Oklahoma territory (now state), passed an ordinance, entitled "Ordinance No. 262," for the purpose of extending and constructing lateral sewers in certain portions of said city. This proceeding in error is to review the decree of the trial court enjoining the collection of assessments made by virtue of said ordinance.

The following questions are presented for determination:

(1) That Ordinance No. 262 attempts to authorize the mayor and city council to let the contract to a contractor or some outside party for the construction of said laterals (when the same should be done by the city direct) and to levy special assessments upon the abutting lots for the payment of such contract price, and for that reason the ordinance is in conflict with section 416, Wilson's Rev. & Ann. St. 1903 (Sess. Laws 1897, p. 80).

(2) That said Ordinance No. 262 authorizes the mayor and city council to apportion the cost and expense of the construction of the said laterals equally on all lots abutting thereon, when said assessment should be levied "on all lots abutting upon such

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sewer" and apportioned thereto "according to the actual cost of labor or material expended in constructing such lateral along the lot assessed," and for that reason it is in violation of section 416, Wilson's Rev. & Ann. St. 1903 (chapter 6, art. 3, Sess. Laws 1897).

(3) That the ordinance does not specify the actual cost of labor and material furnished.

(4) That the work of constructing all the laterals was done in a very negligent and unskillful manner, and not in accordance with the plans and specifications therefor.

(5) That none of the jurisdictional prerequisites for the levying, by the mayor and city council, of a special assessment against the lots abutting on said laterals, had been taken, and that no notice was given of a time and place where the defendants in error might appear and offer objections to the justness or correctness of said assessment.

(6) That the pretended assessments were made by the plaintiffs in error without regard to the special benefit conferred by the construction of said laterals along the said lots, but in accordance with the prearranged estimated cost of constructing the portion of each lateral contiguous to each lot assessed.

1. The question raised in the first assignment has been settled by the Supreme Court of the territory of Oklahoma against the contention of the defendants in error. *Jones et al. v. Holzapfel et al.,* 11 Okla. 405, 68 Pac. 511. That holding is supported by *Hitchcock v. City of Galveston,* 96 U. S. 341, 24 L. Ed. 659; *Galveston v. Heard,* 54 Tex. 420; 2 Dillon on Municipal Corporations, sec. 810.

2. Section 3 of Ordinance No. 262 provides:

"That when said extension and construction is completed, the mayor and city cuncil shall apportion the cost and expense of said extension and construction, calculating each section of section one of this ordinance, separately, to the various lots abutting on such extension, which shall be a special assessment against each and every lot abutting on said lateral sewers. The cost and expense of constructing said lateral sewers across each and every street and alley shall be apportioned equally on each

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and every lot, each section of section one of this ordinance being estimated separately."

The plain language of section 3 of said ordinance shows that the cost and expense of constructing said laterals was to be apportioned equally on each and every lot, when the statute (section 416, Wilson's Rev. & Ann. St. 1903, *supra*) required the same to be apportioned according to the actual cost of labor or material expended in constructing such lateral along the lot assessed. In *Jones et al. v. Holzapfel et al., supra,* it is said:

"But the improvements having been made, the assessment upon the various lots abutting upon which the extension of the lateral sewers was made, under section 3 of the city ordinance, providing that 'when said extension and construction is completed, the mayor and city council shall apportion the cost and expense of said extension and construction, calculating each section of section one of this ordinance separately, to the various lots abutting on such extension, which shall be a special assessment against each and every lot abutting on said lateral sewer.' "

It will be observed that the language of the ordinance involved in *Jones et al. v. Holzapfel et al., supra,* is identical with that used in section 3 of the ordinance under consideration. In the opinion in that case the court said:

"The statute seems sufficiently plain if we pursue the rule by which we are required to accept a statute in its literal meaning, if that literal meaning be such as can be easily and readily understood, and which is susceptible of enforcement. The statute here directs the special assessment to be made for the construction of each lateral sewer on all lots abutting upon such sewer, and then lays down the rule upon which such apportionment shall be made. * * * We think, therefore, that the apportionment was made upon an erroneous principle, the principle of equality, not authorized by statute."

Further on in the opinion it is said:

"We now hold that the assessment made in this case was not made in conformity with the statute, is therefore without authority and illegal, and should be restrained. The pleadings in the case furnish us no means of discriminating and ascertaining what portion of the assessment would be due if the assessment had been made in conformity to the law, and we must therefore hold that the whole assessment as made must fail, not-

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withstanding the fact that no part of the assessment was paid or offered to be paid. We do not here make a rule precluding the collection of the amount due from the abutting property, when the assessment shall be properly made, holding, as we do, that the contract under which the work was done was one which the corporation was authorized to make."

So, under the allegations of the petition, section 3 of the ordinance contemplated that the assessment should be apportioned equally on each and every lot, and not according to the actual cost of labor or material expended in constructing such lateral along the lot assessed. The said ordinance also bears out the allegation; the correctness of the same being admitted by the answer of the defendants (plaintiffs in error).

It is insisted, however, that this vice was cured by a subsequent act on the part of the council. Section 416, *supra,* provides:

"That in cities of the first class, the city council may, by *ordinance* (italics ours), provide for the extension or construction of laterals to main or lateral sewers constructed at the costs of the city, and shall be authorized to levy a special assessment on all lots abutting upon such sewer, and shall apportion such levy to the various lots, according to the actual cost of labor or material expended in constructing such lateral along the lot assessed."

This statute seems to contemplate that this shall be done by ordinance, and not by resolution. See, also, section 7, c. 6, page 96 (act of March 16, 1903), Sess. Laws 1903. That being so, the action of the council subsequent to the commencement of this injunction proceeding, seeking to cure the vice complained of by passing a resolution providing for the manner of the apportionment of the assessment, and fixing a day for the hearing, was void.

In *Kerker et al. v. Bocher et al.,* 20 Okla. 729, 95 Pac. 981, the question was raised as to whether the resolution therein relied on was ineffective in that such act of the council must be expressed by ordinance; but there we held that, on account of the acts of the complaining parties, they were estopped from setting up such fact. In the case at bar the resolution was passed

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after the injunction proceeding had been commenced. The defendants in error were then and there in court complaining and objecting to the assessment and seeking to restrain the plaintiffs in error from enforcing the alleged assessment against their property. In that respect no estoppel could operate against them. However, an estoppel was attempted to be pleaded in the answer by the defendants (plaintiffs in error) on the ground that the defendants in error had stood by and permitted the improvements or sewers to be laid and completed without objecting that the ordinance under which the same were being laid was invalid. But the question here involved is that the parties were entitled to have the assessment made and apportioned according to the actual cost of labor or material expended in constructing such lateral along the lot assessed.

Under the authority of *Jones et al. v. Holzapfel et al., supra,* a new apportionment can be made by enacting an appropriate ordinance. In the opinion in that case it is said:

"It will be left to the plaintiffs in error to take such steps under the statute, as we construe it, to make a new apportionment upon the defendant's abutting property, for so much of the expense of the lateral sewer against each lot as has been expended in constructing such lateral along the particular lot assessed."

3. This assignment is disposed of under assignment 2, *supra.*

4. It is not essential that we consider this assignment in view of the record in this case.

5. It is not necessary that we now pass on this question.

The judgment of the lower court is affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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CURRY *et al.* v. McDANIEL *et al.*

No. 1489. Opinion Filed May 14, 1912.

(124 Pac. 319.)

1. **EQUITY—Reference—Report—Conclusiveness.** Under the law in force in the Indian Territory prior to statehood, where a cause was referred to a master over objection for any purpose other than to take testimony and state an account, the report is persuasive only and should not be sustained if against the preponderance of the evidence.

2. **DOWER—Assignment—Actions—Report of Master.** Record examined and report of the master held to be against the preponderance of the evidence.

(Syllabus by the Court.)

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by Fannie Curry and others against E. E. McDaniel and others . Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Wiley H. Jones, for plaintiffs in error.

Lester & Hammon, for defendants in error.

TURNER, C. J. On October 1, 1907, Fannie Curry, plaintiff in error, the widow of Thomas A. Curry, filed her complaint in equity in the United States Court for the Central District of Indian Territory, sitting at McAlester, against E. E. McDaniel and against Maria Atkins, the mother, and certain other persons, the first cousins, naming them, as the only heirs at law of said Curry, deceased, and also against the unknown heirs of said Curry. The object of the suit was to have dower set apart to her in certain lands (describing them) of which said Curry died seised and possessed on May 23, 1903, within the jurisdiction of the court. After the mother had died and thus passed out of the case, Cicero Curry, Allen Curry, George Curry,

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Maria Harris, and Laura Joshua appeared and by leave of court answered and claimed to be also first cousins of Thomas A. Curry, and as such entitled to share in the estate. E. E. McDaniel filed a cross-bill in which he sought a partition of the property which he held in common with deceased. On the hearing, dower was assigned and the land partitioned in kind as prayed and, over objection of appellants, the widow and known heirs, the cause was thereafter, on motion of defendants, referred by the court to the master to ascertain and report to the court who were the heirs or next of kin to Thomas A. Curry, deceased, which he did, finding said Cicero Curry, Allen Curry, Maria Harris, and Laura Joshua also to be first cousins of the deceased as they alleged. After exception thereto as to this finding filed and overruled and judgment rendered and entered upon the report of the referee, which was approved, plaintiffs in error bring the case here.

They assign that the court erred in finding said parties to be first cousins of the deceased, which finding they say is against the weight of the evidence. This is the sole question involved. This report was merely advisory. Concerning the force to be given a report such as this, in *Scroggy et al. v. Kelley et al.*, 32 Okla. 398, 122 Pac. 694, we said:

"It is urged that it was error to refer the cause to a master over the objection of the defendants. Under the law as it existed in the Indian Territory prior to statehood, the court had the right to refer a cause to the master for the purpose of taking testimony or of stating an account (Mansf. Dig., secs. 5260 and 5263 [Ind. T. Ann. St. 1899, secs. 3465, 3468]) of its own motion and without request by the parties. But, if referred for any other purpose, the reference and report of the master did not relieve the court of the duty of weighing the evidence and passing on the whole case. 'It is not competent for a court of chancery of its own motion, or upon the request of one party, to abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its officers. Henderson's Chancery Practice, sec. 152.' See, also, *Kimberly v. Arms*, 129 U. S. 512 [9 Sup. Ct. 355, 32 L. Ed. 764]; *Davis v. Schwartz*, 155 U. S. 631 [15 Sup. Ct. 237, 39 L. Ed. 289]; *Claypool v. Johnston*, 91 Ark. 549 [121 S. W. 941]. A

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report made by a master, where the whole case was referred over the objections of one of the parties, would not be entitled to the same presumption of its correctness as if the cause had been referred by consent. Where the master was appointed over the objection of one of the parties no presumption would exist in favor of his report, and it would be the duty of the court to review the evidence and decide the case. *In Claypool v. Johnston,* 91 Ark. 549 [121 S. W. 941], the court said: 'But where the master is appointed by the court upon its own motion as is said in the case of *Kimberly v. Arms,* 129 U. S. 512 [9 Sup. Ct. 355, 32 L. Ed. 764]: "The information which he may communicate by his findings in such cases upon the evidence presented to him is merely advisory to the court, which it may accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence." When the court of its own motion deems it fit or necessary to refer to a master any matter for the purpose of aiding or facilitating the court in the proceedings incidental to the cause, it is the duty of the court to review the findings of such master.' The findings of the master in this case were not binding on the court and did not have the same efficacy or effect as a verdict of a jury."

Being merely advisory, the finding of the referee approved by the chancellor that said defendants in error were born in lawful wedlock and were first cousins of the deceased will be sustained if not against the preponderance of the evidence. *Horn et ux. v. Gibson,* 24 Okla. 481, 103 Pac. 563; *Claypool v. Johnston, supra,* citing *Whitehead v. Henderson,* 67 Ark. 200, 56 S. W. 1065; *Brown v. Wyandotte & S. E. Ry. Co.,* 68 Ark. 134, 56 S. W. 862; *Greer v. Fontaine,* 71 Ark. 605, 77 S. W. 56; *Sulek v. McWilliams,* 72 Ark. 67, 78 S. W. 769; *Hinkle v. Broadwater,* 73 Ark. 489, 84 S. W. 510; *Norman v. Pugh,* 75 Ark. 52, 86 S. W. 833. Such it clearly was.

After a careful review of the record on this point, the preponderance of the evidence discloses that prior to the Civil War there lived in Georgia a certain planter named Pleas Curry who was the owner of two slaves, Dempse and Fannie, who were married according to the custom of slaves (validated by subsequent legislation) and were the parents of Jabe and Maria, also slaves; that Jabe married a slave woman named Louisa to whom were

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born in what is conceded to be lawful wedlock (or made such by subsequent legislation) Dora Curry (now Kelly), Charles Curry, Columbus Curry, Fannie Curry (now Rowe), Maria Curry (now Hawkins), Willie Curry, Hilliard Curry (now Hawkins), and Abram Curry, all of whom the master found and all concede to be first cousins of deceased, who was the only son and heir of Jabe's sister Maria who intermarried with a slave named Lee Adkins and died subsequent to the death of her father and mother, Dempse and Fannie; that, while Dempse was thus married and living with Fannie, there was also living on the Pleas Curry place another slave woman named Peggy Curry to whom said Dempse had born out of lawful wedlock Malinda and Racheal Curry, both of whom died subsequently to the death of Dempse and Peggy, the latter without issue, leaving as the sole heirs surviving of the former, her children Allen Curry, Cicero Curry, George Curry, Laura Joshua, and Maria Harris, defendants in error, whom the master also found to be the first cousins and next of kin of said Thomas Curry, as stated, but whom we find, from the great preponderance of the evidence to be not so, but who being born out of wedlock have no inheritable blood of the deceased and are not entitled to share in this estate. 19 Am. & Eng. Ency. Law, 1169; *Hall v. U. S.*, 92 U. S. 27, 23 L. Ed. 597; Rogers on Dom. Rel. 558. This we find, in effect, to be the undisputed testimony of practically all the twenty-six witnesses in the cause, including some of the descendants of Pleas Curry who were contemporaneous with these old slaves and who testified positively as against some three or four parties in interest whose testimony was more or less vague and uncertain, amounting at most to a mere surmise that Dempse was married to Peggy. While we are aware that the presumption is in favor of legitimacy, we think that presumption has been fairly overcome here, and such should have been the holding of the court whose action in adopting and approving the report of the master in his finding to the contrary can only be accounted for upon the assumption that the court gave undue weight to his

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report and attributed to it, in effect, the weight of the finding of a jury instead, as he should, of regarding it as merely persuasive.

Reversed and remanded.

All the Justices concur.

LYNCH v. HARRIS.

No. 1503. Opinion Filed May 14, 1912.

(124 Pac. 50.)

INDIANS—Indian Lands—Allotment. By reason of section 22 of an act of Congress, approved July 1, 1902 (chapter 1375, 32 U. S. St. at L. p. 716; 1 Kappler's Indian Affairs, Laws and Treaties, p. 789), the Commissioner to the Five Civilized Tribes, upon motion made before him, and the Secretary of the Interior, on appeal from an order of said Commissioner, have power at any time before the issuance of patent to an allottee of the Cherokee tribe of Indians, upon notice to such allottee and after hearing, to cancel and set aside a judgment of the Commissioner in a contest awarding to the allottee as contestant the lands allotted to him, when such judgment was procured without service of notice of contest upon the contestee, and without an opportunity given to the contestee to be heard, but upon a false and fraudulent affidavit made by the contestant or one acting for him, showing that such service had been made.

(Syllabus by the Court.)

Error from District Court, Rogers County;
T. L. Brown, Judge.

Action by John F. Harris, a minor, by J. B. Rutherford, guardian, against Elzira Lynch, a minor, by guardian. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

This case originated in the district court of Rogers county. The original plaintiff was John F. Harris, a minor, by John B. Rutherford, his guardian, who is now the defendant in error, but will hereafter be called plaintiff. The original defendant was Elzira Lynch, a minor, who is now the plaintiff in error, but will hereafter be called defendant. Plaintiff sought by his peti-

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tion in the court below to have the allotment of certain lands theretofore made to defendant as a member of the Cherokee tribe of Indians declared a nullity, and that whatever title defendant may have in and to the lands described in her petition be decreed to be held by defendant in trust for plaintiff, and that a conveyance of the legal title thereto be decreed to plaintiff. The trial in the court below was to the court without the intervention of a jury. After the introduction of evidence by plaintiff, the court overruled defendant's demurrer to plaintiff's evidence, and defendant elected to stand upon her demurrer, and judgment was accordingly rendered for plaintiff as prayed for in his petition. Plaintiff is a duly enrolled citizen by blood of the Cherokee tribe of Indians, and defendant is an enrolled citizen of the Cherokee Nation as a Cherokee freedman. The land in controversy is located in Rogers county, and formerly constituted a part of the tribal lands of the Cherokee tribe of Indians. On March 28, 1905, defendant, by her mother and natural guardian, Martha Martin, who is also an enrolled citizen of the Creek Nation, selected the land in controversy as a portion of defendant's allotment, to which she was entitled as a member of the Cherokee tribe of Indians. On April 22, 1905, plaintiff, by his mother and natural guardian, instituted contest proceedings against Elzira Lynch for the land in controversy. This proceeding was instituted before the Commissioner to the Five Civilized Tribes on the ground that plaintiff was the owner of the improvements and in possession of the land at the time the same was selected by defendant as a part of her allotment. On September 19, 1905, that contest was first tried before the Commissioner to the Five Civilized Tribes. The evidence taken at that trial is in the record, and constitutes one of the exhibits to plaintiff's evidence. At the trial, the record shows that defendant, who was contestee in the proceeding before the Commissioner, appeared by her stepfather, Fred Martin, and an attorney by the name of J. D. Cox. The stepfather, Fred Martin, is not a citizen of the Cherokee Nation. The Commissioner to the Five Civilized Tribes, upon the evidence introduced at the first trial, awarded to plaintiff the

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land in controversy. Notice of this decree of the Commissioner was mailed by registered letter to the mother of defendant by the Commissioner. Neither defendant nor any one acting for her within thirty days after the rendition of the decree in the contest took an appeal therefrom to the Commissioner of the Land Office, but on January 10, 1907, defendant filed a motion with the Commissioner to the Five Civilized Tribes, asking that his decision awarding the land to plaintiff be set aside. This motion was not introduced in evidence in the court below, and the record does not contain the evidence introduced at the hearing on said motion; but the record does disclose that said motion was duly served upon plaintiff, and he had full notice of the hearing thereon. We are advised in part of the contents of said motion by the findings of the Commissioner to the Five Civilized Tribes in his order setting aside his first judgment, which was rendered on July 13, 1907. By this order the judgment in favor of plaintiff in the contest was set aside, and a new trial ordered upon the ground that plaintiff, contestant in that proceeding, by his mother had made a false return of service, and that no notice of a contest upon defendant or her mother and natural guardian, who selected the allotment for her, as prescribed by the rules of the department in contest matters, had ever been served; and it was found that the appearance by Fred Martin, the stepfather, and by the attorney, appearing at the contest in her behalf, was without authority or knowledge of defendant or her mother. Due notice was given to plaintiff, contestant before the Commissioner, of defendant's motion to set aside the judgment of the Commissioner, but no reply was ever filed to said motion, and the same was not resisted. After this motion to vacate and set aside the first judgment of the Commissioner had been granted and after due notice to both parties, a second rehearing in the contest was had before the Commissioner to the Five Civilized Tribes on January 21, 1908, at which time both parties appeared either both in person and by counsel, or by counsel. Upon the evidence introduced at this hearing, which is also made part of plaintiff's evidence in the court below, and a part of the record in this court, the Com-

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missioner to the Five Civilized Tribes rendered his decision in favor of the contestee, and awarded to her the land she had theretofore allotted. After a motion for rehearing had been filed, plaintiff appealed to the Commissioner of Indian Affairs, who, on September 2, 1908, rendered a decision affirming the decision of the Commissioner to the Five Civilized Tribes. From this decision an appeal was taken by plaintiff to the Secretary of the Interior, who likewise rendered a decision affirming the decision of the Commissioner of Indian Affairs and of the Commissioner to the Five Civilized Tribes, and awarded the land in controversy to the contestee, defendant here; and it is agreed that a patent, issued by the Tribal authorities and approved by the Secretary of the Interior, has been delivered to defendant.

The foregoing is an epitome of the most important facts in the record. Such other facts as are at all material to a decision of the question presented here will be stated in the opinion.

Starr & Patten, for plaintiff in error.

J. B. Rutherford and *Parker, Rider & Brown,* for defendant in error.

HAYES, J. (after stating the facts as above). Provision was made by act of Congress approved July 1, 1902 (32 U. S. St. at L. p. 716; 1 Kappler's Indian Affairs, Laws & Treaties, p. 787), for the allotment in severalty of the lands of the Cherokee Nation or tribe of Indians to the enrolled members thereof. Section 9 of this act provides for an appraisement of all the lands belonging to the tribe. Section 11 provides that there shall be allotted to each enrolled citizen of the tribe lands equal in value to 110 acres of the average allottable lands of the nation, and in making the allotments each Indian is entitled to select lands which will include his improvements. Section 69 provides that there shall be no contest instituted against the selection of any allotment after the expiration of nine months after the date of the original selection of such allotment by or for any citizen of the tribe.

Section 21 directs that:

"Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the

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tract of land described therein, and the United States Indian agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment. * * *"

Section 22 reads:

"Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

And it is further provided by section 65 that:

"All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior."

Although more than nine months had expired after the date of the original selection of this allotment by defendant before the motion to vacate the first judgment rendered by the Commissioner to the Five Civilized Tribes was filed, there is an absence of any evidence to show that a certificate of allotment had been issued to plaintiff, except that the United States Indian agent, prior to filing the motion to vacate, had under the direction of the Secretary of the Interior placed plaintiff in possession of the allotment. But we do not regard it material, in so far as it affects the only question presented by this proceeding, whether the allotment certificate had been issued or not to plaintiff before the motion to vacate was filed, for, if nine months had expired from the original selection of the allotment, the time within which to file a contest had elapsed, and plaintiff was entitled to the certificate of allotment; and, if he was vested with an equitable right and title in and to the allotment, the certificate of allotment, when issued, constitutes only evidence of his right and authority to the United States Indian agent to place the allottee in possession. The equitable estate vests, not by reason of the issuance of such certificate, but by reason of the fact that the allottee is an enrolled member of the tribe, entitled to allotment, has selected it in the manner provided by law; the time for filing his contest having expired and having done all other things required by the statute of him to entitle him to any specific

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tract of land as his allotment. Such certificate does not convey to him the legal title; for, by section 58 of the act, it is provided that the Secretary of the Interior shall furnish the principal chief of the tribe with blank patents necessary for all conveyances provided for by the act; and when any citizen has received his allotment or when any allotment has been so ascertained that title should, under the provisions of the act, be conveyed, the chief shall thereupon proceed to execute and deliver to the allottee a patent, conveying all the right, title, and interest of the Cherokee Nation and of all other citizens in and to the land embraced in the allottee's allotment certificate.

Section 59 reads:

"All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent."

By section 60 it is provided that the acceptance by any allottee of a patent to his allotment shall be deemed an assent to the allotment and to the conveyance of all the lands of the tribes as provided for in the act and a relinquishment of all his right and title in and to the same, except in the proceeds of lands reserved from allotment. There is no specific provision in the act that the allotment certificate shall convey any title. If it had been intended that the issuance of a certificate of allotment should operate to convey the legal title to an allotment, it would not have been provided by the foregoing sections that such right and title should be conveyed by patent, or that such patent should convey the lands embraced in the allottee's allotment certificate. *Michigan Land & Lumber Co. v. Rust,* 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591. Acting under section 65, *supra,* of the act, the Commissioner to the Five Civilized Tribes, under the direction and supervision of the Secretary of the Interior, promulgated rules to govern the institution and prosecution of contests before the Commissioner against the selection of allotments. These rules require that at least thirty days' notice shall be given of all hearings before the Commissioner, unless by written consent an earlier day shall be agreed upon. They also

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require that all notices of contest or summons shall be made upon blanks prepared and supplied by the Commissioner; and that personal service of such notice shall be made in all cases where the party to be served is a resident of the Indian Territory. Rule 7 reads as follows:

"If the person to be personally served is an infant or a person of unsound mind, service shall be made by delivering a copy of the notice and summons to the guardian of such infant or person of unsound mind, if there be one. If there be none, then by delivering a copy to the person having the infant or person of unsound mind in charge, and also to the person who made the selection for such infant or person. And if the contestee is a prisoner, convict, aged or infirm person, or a soldier or sailor of the United States on duty outside of the Indian Territory, service shall be made as herein otherwise provided, and a copy of the notice and summons shall also be served on the person who made the selection for such prisoner, convict, aged or infirm person, soldier or sailor."

Under the foregoing rule, where the contestee is an infant or person of unsound mind, service of notice of contest is required to be made upon the person having the infant in charge, and also upon the person who made the selection for such infant. It appears that the return of service made by the mother of plaintiff before the original hearing showed service of the notice of contest to have been made upon the mother of defendant; that such affidavit of service by plaintiff's mother was false and a fraud upon the department is not seriously questioned in this proceeding, and the finding by the Commissioner upon the motion to vacate that no such service was had and that the stepfather and attorney who had appeared at the original trial were without authority to do so, and did so without the consent of the mother and minor, is conclusive upon this court, for the evidence at the hearing upon the motion to vacate and set aside the original order of the Commissioner is not preserved in the record before us. *Ross et al. v. Wright et al.*, 29 Okla. 186, 116 Pac. 949. Nor was any authority vested in the stepfather by statute or rule of the Commissioner to represent defendant in the contest. Section 70 of the act provides:

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"Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by a guardian or curator, or the administrator having charge of their estate, in the order named. * * *"

Under this provision of the statute, the stepfather was without any authority in the premises, both because he is not the father of defendant, nor is he a citizen of the tribe. He had no authority by virtue of rule 7, *supra*, of the Commissioner, because he was not in charge of defendant, nor was he the person who selected her allotment; but rule 20 of the department provides:

"Motions for reinstatement, after dismissal as provided in rule 14, and for rehearing or review, must be filed within twenty days from service of notice of the final order or decision in case of personal service of said notice and within thirty days in case of service of said notice by registered letter, said motion first having been served on the opposite party or his attorney, either personally or by registered letter. The party on whom the motion is served will be allowed the same length of time after service of motion in which to file a reply, service thereof first having been had on the opposite party, or his attorney, either personally or by registered letter."

And rule 22 reads:

"In case of failure to file a motion to reinstate, or for rehearing or review, within the time prescribed by rule 20 the case will be regularly closed."

Plaintiff's sole contention for reversal of this cause and his right to recover is based upon the foregoing two rules of the Commissioner, and is that each of the officers of the department before whom the contest was heard or any proceeding was taken after the expiration of thirty days after the decree of the Commissioner to the Five Civilized Tribes in his favor was without jurisdiction to act; that is, that the Commissioner in the first instance and the Secretary of the Interior on appeal are without power to set aside the first judgment of the Commissioner in his favor. This contention is not sound. In the first place, we do not think that the foregoing rules relied upon by plaintiff have any application to his case. Those rules contemplate that there has been a hearing of which both parties to the contest have had notice and an opportunity to be heard; and that, although in

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fact one party on account of his voluntary absence may not have been heard in fact, in law he has been heard, because given an opportunity to be heard in the manner prescribed by the rules of the department. When a hearing of this character has occurred, these rules then apply. But in the case at bar defendant had never had a hearing. The Commissioner had never obtained jurisdiction of her person to try this controversy. The judgment rendered against her by the Commissioner was in plain violation of the rules governing it in contests, secured by the fraud of plaintiff's mother acting for him. We find no rule promulgated that in our opinion prescribes the procedure to be pursued by a party aggrieved in this manner for remedy before the Commissioner or the Department of the Interior; but the Commissioner, acting under the direction or supervision of the Secretary of the Interior, or the Secretary of the Interior, in the absence of any such rule, was not without authority to grant relief to defendant from the fraud that had been perpetrated against her and against the department. The identical language of section 22, *supra*, constitutes section 24 of the Supplemental Agreement between the Commission to the Five Civilized Tribes and the Chickasaw and Choctaw tribes of Indians, and the jurisdiction of the Commission conferred by this provision upon the Commission to the Five Civilized Tribes under the direction of the Secretary of the Interior and the effect of the Commission's action in the first instance and of the Secretary of the Interior on appeal, or in a direct proceeding before him in the allotment of lands to the members of said tribe, is the same as the jurisdiction and the effect of the action of the Land Department of the United States in the disposition by patent of the public lands within its control. *Sorrels v. Jones et al.*, 26 Okla. 569, 110 Pac. 743; *Wallace et al. v. Adams et al.*, 143 Fed. 716, 74 C. C. A. 540. The power of the Public Land Department and of the Secretary of the Interior in his supervisory control over same to determine upon proper notice to the parties interested all questions of equitable right and title before the legal title has passed from the government is well settled by a long line of decisions from

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the Supreme Court of the United States. The character and extent of that power is well defined in *Cornelius v. Kessel,* 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482, by Mr. Justice Field in the following language:

"The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

Other cases supporting this rule are *Lee v. Johnson,* 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; *Knight v. U. S. Land Association,* 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Pierce v. Frace,* 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; *Parsons v. Venzke,* 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360; *Brown v. Hitchcock,* 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Hawley et al. v. Diller,* 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157; *Love v. Flahive,* 205 U. S. 195, 27 Sup. Ct. 486, 51 L. Ed. 768; *Freese v. Rusk et al.,* 54 Kan. 274, 38 Pac. 255; *Gage v. Gunther,* 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; *Jones v. Meyers,* 2 Idaho, 793, 26 Pac. 215.

Speaking of the control of the exercise of this power by the Secretary of the Interior by established rules of the depart-

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ment in *Knight v. U. S. Land Association, supra,* it was said:

"It makes no difference whether the appeal is in regular form according to the established rules of the Department, or whether the Secretary on his own motion, knowing that injustice is about to be done by some action of the Commissioner, takes up the case and disposes of it in accordance with law and justice. The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands."

In *Pierce v. Frace, supra,* plaintiff had filed his declaratory statement for a tract of land under the pre-emption laws of the United States. He had made his final proof and his cash entry had been allowed by the register and receiver of the local land office. Thereafter defendant filed in the office of the Commissioner of the General Land Office, and afterwards in the local land office, his affidavit that plaintiff had not so established his residence on the land, that he had failed to improve the same and cultivate the same as provided by law, and that the cash entry had been procured by fraud. The Commissioner of the General Land Office ordered a hearing on the charges before the local land office, and upon such hearing the entry of plaintiff was canceled, and defendant was permitted to file. After patent issued to defendant, plaintiff sought to have defendant declared as holding the title in trust for plaintiff, and contended that the determination of his right to the land by the local land office and that he had complied with the law entitling him to patent was a judicial determination from which no appeal was allowed by statute or rule and was therefore a final determination of his rights. The decision of the court sustains the action of the department, and holds that the Secretary of the Interior had jurisdiction to review the judgment of the local land officers and to order the entry, shown to be fraudulent, to be canceled.

Garfield v. Goldsby, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, and *Ballinger v. U. S. ex rel. Frost,* 216 U. S. 240, 30

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Sup. Ct. 338, 54 L. Ed. 464, are relied upon by plaintiff in this action, but they are not in point. In the Goldsby case the Secretary of the Interior had, without notice and an opportunity to be heard, struck Goldsby's name from the rolls of the Chickasaw Nation or tribe of Indians, which had theretofore been approved by the Dawes Commission and the Secretary of the Interior. In the Frost case, after a tract of land had been allotted to her, the period for contest having expired and the certificate of allotment issued under the treaties regulating the allotment of lands of the citizens of said nation, the land allotted to her was segregated by the Secretary of the Interior for town-site purposes and her allotment canceled. Her action to compel, by mandamus, the Secretary of the Interior to cause to be issued to her a patent to said lands was sustained. The difference in these cases is apparent. In the Goldsby case the action of the Secretary of the Interior complained of was arbitrary and denied to Goldsby due process of law, in that the Secretary of the Interior failed to give him notice and an opportunity to be heard. In the Frost case, after notice of hearing and an apportunity to be heard, the Secretary acted arbitrarily, in that he canceled her allotment, not because any mistake of law had been made or any fraud practiced, but after the allottee had in good faith complied with all the requirements of the law, entitling her to the allotment, and a certificate had been issued as evidence of that fact, the Secretary of the Interior canceled her allotment, and attempted to give it to other persons. The supervisory power of the Secretary of the Interior over the Land Department and the officers therein in the administration of the public lands of the government or of the tribal lands under these acts of Congress can neither be exercised arbitrarily by acting without notice nor without authority of law after notice. In the case at bar plaintiff was given notice of the motion and the hearing thereon to set aside and vacate the first judgment of the Commissioner in his favor, which appears not to have been contested by him. Thereafter notice of a hearing of the contest was given, and plaintiff appeared by counsel at that hearing. Upon the evidence introduced, the Commissioner

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found that plaintiff was not the owner of the improvements or in possession of the land at the time defendant allotted same, and that he was not entitled as against defendant to select said lands as his allotment. This decree of the Commissioner was thereafter affirmed by the Commissioner of Indian Affairs and the Secretary of the Interior. A copy of the evidence introduced at this hearing was introduced as evidence in the trial in the court below, and forms part of the record here. There is some conflict in that evidence; but, in the absence of fraud, imposition, or mistake, the findings of fact by the Commissioner to the Five Civilized Tribes, approved by the Secretary on appeal, are conclusive upon this court. *Love v. Flahive, supra; Ross v. Stewart,* 25 Okla. 611, 106 Pac. 870. We think *Sorrels v. Jones et al., supra,* practically decisive of the question presented by this proceeding; but in view of the fact that two other cases are now pending in this court upon a similar state of facts, and of which our decision in this case will be decisive, we have thought best to review the authorities applicable to the questions at somewhat more length than was done in *Sorrels v. Jones et al., supra.*

It follows from the views already expressed that the judgment of the trial court should be reversed and the cause remanded, with direction to enter judgment in accordance with this opinion.

TURNER, C. J., and WILLIAMS, KANE and DUNN, JJ., concur.

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LYNCH v. HARRIS.

No. 1502. Opinion Filed May 14, 1912.

(124 Pac. 50.)

INDIAN LANDS. Syllabus same as in **Lynch v. Harris, ante,** 124 Pac. 50.

(Syllabus by the Court.)

Error from District Court, Rogers County; T. L. Brown, Judge.

Action by William B. Harris, a minor, by J. B. Rutherford, guardian, against Elzira Lynch, a minor, by Moses Riley, guardian. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Starr & Patten, for plaintiff in error.

J. B. Rutherford and *Parker, Rider & Brown,* for defendant in error.

HAYES, J. The material facts in this case are so similar to the facts in *Lynch v. Harris, ante,* 124 Pac. 50, that it presents identically the same question of law that was presented and decided in that case, and it follows upon the authority of that case that the judgment of the trial court should be reversed and the cause remanded, with instructions to enter judgment denying the plaintiff in error the relief prayed for in his petition filed in the trial court; and it is so ordered.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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ARDMORE LODGE No. 9, I. O. O. F. v. DAWSON *et al.*

No. 1513. Opinion Filed May 14, 1912.

(124 Pac. 66.)

APPEAL AND ERROR—Review—Grant of New Trial. This court will not reverse the ruling of the trial court granting a new trial unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made.

(Syllabus by the Court.)

Error from Carter County Court;
L. S. Dolman, Special Judge.

Action by Ardmore Lodge No. 9, I. O. O. F., by Henry Kimball and others, trustees, against K. W. Dawson and others. Verdict for plaintiff, and from an order granting a new trial it brings error. Affirmed.

Guy H. Sigler, for plaintiff in error.

Johnson & McGill, for defendants in error.

HAYES, J. Plaintiff in error, hereinafter called plaintiff, brought this suit in the lower court against defendants in error, hereinafter called defendants, to recover judgment in the sum of $390 as damages for breach of a rental contract. Plaintiff alleges in its petition that on the 14th day of January, 1907, it leased to defendants a certain brick building for a period of one year to begin on the 1st day of September, 1907, and to continue until the 31st day of August, 1908, at a rental of $65 per month. It alleges that defendants moved into the building and occupied same under the contract and paid rents thereon for the period of six months, when defendants, without the consent and over objection of plaintiff, abandoned the building and refused to pay further rents thereon; that plaintiff was unable

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thereafter to rent the building during the term of defendants' contract, and therefore lost the rental value of said building for the period of six months, which, under the contract, was $65 per month.

Defendants' answer admits they made a contract with plaintiff for the period of one year, but alleges that the same began in the month of January, 1907, and alleges that they occupied same for the full period of one year, beginning in said month of January, and paid the rents thereon. The contract between them was not reduced to writing, and there is considerable conflict in the evidence as to the provisions of the contract as to when the term thereunder began and ended.

A trial to a jury resulted in a verdict for plaintiff for the amount sued for. A motion for a new trial by defendants was sustained by the trial court, and it is that action of the court only of which complaint is made in this proceeding.

The condition upon which this court will reverse an order of a trial court granting a new trial is well settled to be that such ruling will not be set aside unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that except for such error the ruling of the trial court would not have been so made. *Jacobs v. City of Perry,* 29 Okla. 743, 119 Pac. 243; *Hogan et al. v. Bailey,* 27 Okla. 15, 110 Pac. 890; *Duncan v. McAlester-Choctaw Coal Co,* 27 Okla. 427, 112 Pac. 982; *Farmers' & Merchants' Nat. Bank of Hobart v. School District No. 56 et al.,* 25 Okla. 284, 105 Pac. 641; *Cit. State Bank, of Lawton v. Chattanooga State Bank of Chattanooga et al.,* 23 Okla. 767, 101 Pac. 1118.

Defendants' motion for a new trial sets up several grounds. We are not informed by the record upon which ground the trial court sustained the motion. The first ground alleged in the motion is that the verdict is contrary to the law and the evidence. For aught we know, it is upon this ground that the new trial was granted. It does not present an unmixed question of law. The evidence was conflicting, and, if we were of the opinion that the

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preponderance thereof supported the verdict of the jury, still that would not be sufficient reason to require a reversal of the order granting a new trial. *Duncan v. McAlester-Choctaw Coal Co., supra; Atyeo v. Kelsey,* 13 Kan. 212; *City of Sedan v. Church,* 29 Kan. 190. Trial courts are vested with large discretion in the granting of new trials, and they ought to grant new trials whenever the party asking for a new trial has not in all probability had a reasonably fair trial, and the verdict returned does not render substantial justice, although it may be difficult for the court to state the grounds for which such new trial was granted. The reading of the record discloses that complete justice was not done to defendants by the verdict rendered, for the verdict is for the exact amount prayed for in plaintiff's petition and is equal to the rents on said building as contracted for the entire period of six months, during which it is alleged the building was abandoned by defendants. But the evidence establishes that plaintiff, for a part of said period, rented said building and collected the rents thereon. For the rents plaintiff collected defendants would be entitled to credit, which was not given in the verdict returned.

Since we are not able to say from the record before us that the trial court materially erred with respect to some pure, simple, and unmixed question of law in granting the new trial, the order appealed from should be sustained, and it is so ordered.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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AUSTIN *et al.* v. CHAMBERS *et al.*

No. 1533. Opinion Filed May 14, 1912.

(124 Pac. 310.)

1. **COURTS — Jurisdiction — Title to Real Property.** The district courts of the state have jurisdiction of actions in ejectment and of actions to remove cloud from title; and the county courts of the state have no jurisdiction of such actions, for the reason that they call into question or dispute title to real estate.

2. **INDIANS—Jurisdiction—Title to Real Property.** Prior to the admission of the state, the will of a deceased Indian was duly probated and executed by the executor in the Indian Territory, and all the debts of the estate paid. There was but one beneficiary under the will. **Held,** that a district court of the state has jurisdiction of an action in ejectment to recover possession of or of a suit to remove cloud from title to the allotted lands of deceased, brought by the heirs at law of deceased against the beneficiary under the will claiming title to said lands under the will, in which action the heirs contend, first, that the will of deceased does not devise the land in controversy; and, secondly, if it attempted to devise it, it was not within the power of deceased to devise said lands.

(Syllabus by the Court.)

Error from District Court, Rogers County;
H. Jennings, Special Judge.

Action by Sarah Austin and another against Teece Chambers and another. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

E. S. Bessey, for plaintiffs in error.

Jno. Q. Adams and *Joe Chambers,* for defendants in error.

HAYES, J. Sarah Austin and Lizzie Kingfisher, plaintiffs in error, plaintiffs below, brought this action in the lower court against Teece Chambers and Nancy Chambers, as defendants, to remove cloud from title to one certain tract of land of which plaintiffs alleged they were the owners, and to obtain judgment for possession for certain other tracts of land of which plain-

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tiffs allege they are the owners, and for damages for detention thereof by defendants.

Plaintiffs allege in their amended petition that they are the only heirs at law of one Rebecca Yahn, who was a citizen of the Cherokee Tribe of Indians, and who departed this life in November, 1903. They allege that deceased, at the time of her death, was, as a member of said tribe of Indians, entitled to an allotment of land which had not been selected or allotted to her; that deceased left a will; that after defendant Teece Chambers had been duly appointed executor of said will he selected and filed on the lands in controversy as the allotment of said Rebecca Yahn for and on behalf of the heirs and distributees of deceased. His appointment as executor was made on the 9th day of December, 1903, in one of the United States Courts of the Indian Territory at Claremore. They allege that the will of deceased does not devise the allotment of land selected by the executor, and that at the time of her death deceased had no title in and to the same; that upon the selection of said lands the legal title immediately became vested in them as the sole heirs at law of deceased; and that all the decedent's debts have been paid. As to the N. E. ¼ of the S. E. ¼ of section 1, township 13, range 24, situated in Delaware county of this state, they allege that defendant Teece Chambers, as executor, and defendant Nancy Chambers as sole beneficiary under Rebecca Yahn's will, claim some title or interest in said lands by reason of said will; and that both are endeavoring in the probate court of Rogers county to have said land set over and distributed to them under said will; and that said will and the claims of defendants thereunder constitute a cloud upon their title. As to the other tracts of land described in their amended petition, they allege that defendants are in wrongful possession thereof, claiming to be the owners of the title thereto; and that they have been in possession of same and collected the rents and profits therefrom since the allotments were made, during all of which time plaintiffs allege that they have been the owners of the legal and equitable title to said lands, and have been unlawfully deprived of

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the rents and profits thereon. For these tracts of land, they pray judgment for possession and damages.

There was a demurrer to the amended petition upon several grounds, which was by the trial court overruled. Thereafter answer was filed by which defendants deny each and every allegation of the amended petition, except such as are specifically admitted, qualified, or explained. They allege that under the terms of Rebecca Yahn's will the defendant Nancy Chambers is the sole beneficiary and entitled to a decree of the county court, distributing to her all the property, both real and personal, of deceased, subject to the payment of deceased's debts. They allege that at the death of deceased she owed a large number of debts, which have been fully paid out of the proceeds of other property, constituting part of deceased's estate, sold by order of court for the payment of said debts.

Defendants objected to the introduction of any testimony by plaintiffs, upon the ground that the district court was without jurisdiction to try said cause. The court reserved his opinion upon said objection until all the evidence had been introduced by both parties; whereupon he held that the district court was without jurisdiction, because such jurisdiction exists in the county court, which is now exercising jurisdiction in the matter, and for that reason dismissed the cause. It is to reverse this judgment of dismissal that plaintiffs prosecute this proceeding; and the sole question presented for our consideration at this time is, Has the trial court jurisdiction of the case? This question, we think, must be answered in the affirmative.

It will be observed from the facts above stated that Rebecca Yahn died, her will was probated, an executor appointed, all the debts against her estate paid, and the selection of the allotment of the land in controversy made before the admission of the state into the Union, and at a time when chapters 1 and 155 of Mansf. Dig. of Ark. were in force in the Indian Territory and regulated the probating of wills and the administration of estates of deceased persons. Chapters 4 and 58, Ind. T. Ann. St. 1899. The selection of the allotment by her executor was by

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authority of section 20 of an act of Congress, approved July 1, 1902, providing for the allotment of the lands of the Cherokee Nation to the members of the tribe. 1 Kappler's Indian Affairs, Laws, and Treaties, p. 789. That section provides that if any person whose name appears upon the rolls of the tribe shall have died subsequent to the 1st day of September, 1902, before receiving his allotment, the land to which he would have been entitled to, if living, shall be allotted in his name, and shall descend to his heirs according to the laws of descent and distribution, as provided by chapter 49 of Mansf. Dig. of Ark. (Ind. T. Ann. St. 1899, c. 21), and authorizes the selection of the allotment to be made by a duly appointed administrator or executor. While plaintiffs allege that deceased had no estate in the land in controversy at the time of her death which she could devise by will, they concede that she had such an estate as was subject to the payment of her debts, in the absence of other property in sufficient amount to pay them. We do not determine whether this concession is the law; for it is admitted that there was sufficient other property to pay the debts, and that the same were paid. It is well settled by decisions under the statute in force in the Indian Territory, controlling in this case, that the real estate of a deceased person is assets in the hands of an administrator only for the payment of the debts against the estate. If there are no debts against the estate, or there is sufficient other property subject to the payment of same to pay all the debts, the title to the lands of a deceased person descend to his heirs, or pass to the beneficiaries under his will, free of any claims of the administrator or right to the possession thereof. *Stewart v. Smiley,* 46 Ark. 373; *Sisk v. Almon et al.,* 34 Ark. 391; *Tate et ux. v. Jay et al.,* 31 Ark. 577; *Culberhouse v. Shirey,* 42 Ark. 25.

It follows from the doctrine of the foregoing cases and under the facts in this case relative to the debts of deceased that, upon the allotment of the land to deceased in deceased's name by the executor, title to same vested in defendant Nancy Chambers, beneficiary under the will, provided, of course, the language of

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the will is sufficient to show an intention to devise the expected allotment to her; and deceased had such an estate in the allotment at the time of her death that she could devise it by will. On the other hand, if the will fails to show an intention to devise it, or is void, because said allotment was not devisable, then the same descended to plaintiffs as the heirs at law of deceased, free of any right or claim of her administrator or executor. We do not pass upon the sufficiency of the terms of the will to indicate an intention of the testator to convey her anticipated allotment to the devisee. That question was not passed upon by the trial court; and a decision thereon is neither involved nor necessary to the sole question presented for our consideration by this appeal.

The will does not grant any authority to the executor to partition the real estate devised, and such provision is unnecessary; for the will designates only one beneficiary. Nor is any authority granted to the executor to sell any real estate, except for the purpose of paying debts. No statute existed which conferred upon the United States courts of the Indian Territory, acting under their probate jurisdiction, authority to partition real estate. Probate courts did not exist at common law, and they therefore have no power or jurisdiction by common law, and their authority must be found within the statute or constitutional provision creating them and defining their jurisdiction. *Myrick v. Jacks,* 33 Ark. 425; *Monastes v. Catlin,* 6 Ore. 119. From the facts alleged, it is apparent that the administration of this estate by the executor and the probate courts of the Indian Territory had been completed before the admission of the state, with the exception of the filing by the executor of his report and having the same approved; and that neither had any further authority over the land involved in this controversy.

Section 13, art. 7, of the Constitution, confers original jurisdiction upon the county courts of the state to transact all business appertaining to estates of deceased persons, including the sale, settlement, partition, and distribution of the estates thereof; but this proceeding is not for the purpose of administering an estate

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of a deceased person, or to partition same. It is an action by the heirs at law to an estate that has already been administered against the beneficiary under a will that has been proved and fully executed. It is, as to the first cause of action alleged, to clear title, and, as to the second cause of action alleged, a suit in ejectment. Defendant's defense to these causes of action is that she holds the title to the land involved by virtue of a will that has been duly probated. Plaintiffs, on the other hand, insist that the will is ambiguous, and, when properly construed, does not attempt to devise the land in controversy, but that if it does the deceased had no estate in the land that she could devise. Neither cause of action can be tried without the title to land being called in question. Section 10, art. 7, of the Constitution, confers original jurisdiction upon the district courts in all cases, civil and criminal, except where exclusive jurisdiction is by the Constitution or by law conferred upon some other court. Neither the Constitution nor any statute confers exclusive original jurisdiction of civil actions of the character of the case at bar upon any other court; but section 12, art. 7, of the Constitution, provides that the county court shall not have jurisdiction in any action wherein the title or boundaries to land may be in dispute or called in question. The trial court therefore erred in holding that the district court has no jurisdiction of this cause, and that jurisdiction of same is in the county court.

For that error, the cause is reversed and remanded.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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BANK OF COMMERCE v. INGRAM.

No. 1627. Opinion Filed May 14, 1912.

(124 Pac. 64.)

BANKS AND BANKING—Collections—Negligence—Liability. Where the payee of a check drawn on a bank presents the same to another bank for collection, which bank gives him credit therefor on his passbook, the relation of principal and agent arises, and it is the duty of the agent to exercise reasonable care and diligence to make the collection; and its failure to do so renders it liable for any loss its principal may suffer thereby.

(Syllabus by the Court.)

Error from Muskogee County Court;
W. C. Jackson, Judge.

Action by A. T. Ingram against the Bank of Commerce. Judgment for plaintiff, and defendant brings error. Affirmed.

George S. Ramsey and *C. L. Thomas,* for plaintiff in error.

S. M. Rutherford and *James W. Cosgrove,* for defendant in error.

KANE, J. This was an action, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for alleged negligence in connection with two certain checks which were deposited by the plaintiff with the defendant for collection. On trial to the court, there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The contention of the plaintiff in error is that there was not sufficient evidence adduced at the trial to support the judgment rendered, or to establish any liability whatever on the part of the plaintiff in error, for the reasons, first, that, under the evidence, the defendant in error was guarantor of the payment of the two checks drawn payable to his order by the Muskogee Gin Company on the Bank of Porum, and therefore no notice of non-

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payment was necessary; and, second, that even if it be held that notice of nonpayment of the checks was necessary, the burden of proving negligence on the part of the plaintiff in error, the Bank of Commerce, was upon the defendant in error, and this burden has not been sustained.

Neither of these contentions are well taken. There is very little dispute as to the facts. It seems that in the fall of 1905, the defendant in error, Ingram, was buying cotton for a concern known as the Muskogee Gin Company, whose general agent was one Sheppard; that along about November 1, 1905, Ingram received the two checks in controversy, presented them to the Bank of Porum for payment, and payment was refused, for the reason that the gin company had no funds in the Bank of Porum, having transferred its account at that bank to the defendant bank. The cashier of the Bank of Porum told the plaintiff of the transfer of the account of the Muskogee Gin Company, and that he would have to take the checks to the Bank of Commerce for payment. As to what happened in regard to this, plaintiff testified as follows:

"Well, I went to the other bank and asked Mr. Roach if that was a fact, and he said, 'Yes'; and I said that I have got these two checks here, and he says, 'Well you indorse them, and I will just put them on your passbook.' That was just as I would do any other check. Well, I got credit for them along about the 1st of November, 1905; and I kept on and continued to buy cotton for Mr. Sheppard, and kept on getting checks just like those; but they were written on the Bank of Commerce. And I guess I used, anyhow, seven or eight thousand dollars worth of Mr. Sheppard's checks later than that date, and never had a question raised about his ability for paying them. Well, the season went along, and in March Mr. Sheppard closed his gin and left. Q. When was it you put these checks in? A. It was November, 1905. Q. And when was it the gin company failed? A. It was along in June or July, 1906. They closed the gin down in March and left town. Then I never thought about Mr. Sheppard until along in the summer. One day Mr. Roach called me in and asked me if I had heard that Mr. Sheppard's gin company had failed, I told him 'No,' and he said he was afraid I was going to lose some money; and he said it was these two checks that I had deposited about the 1st of November, and that he had been

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carrying them as cash items, and had never collected them. Mr. Sheppard was gone at this time, and I had no way of getting this money; but at the same time, if I had known this sooner, at any time during the month of January or February, that the checks were not all right, I could have gone to Mr. Sheppard at any time, and he would have given me a check on the Bank of Commerce, and it would have been all right. However, after Mr. Sheppard had left town, then these checks were turned back to me, and I had no way to recover for them; but he would have paid me any day during the time he was there. Q. How long was it after the gin company had failed that he notified you there was any question about the checks? A. I think it was about the month following that I was notified that they had failed. Q. Were those checks charged back against your account at that time? A. No, sir; it was something like the last days of October, or the first days of November, 1906, before that."

The cashier of the Bank of Commerce testified that Ingram deposited the checks with him, and he gave him credit for same; that the checks were turned down; and that he notified Mr. Ingram of nonpayment within a reasonable time, but Ingram asked him not to charge the checks back on him, but to collect them.

Under the rule laid down by this court that it will not weigh the evidence or disturb the findings of the trial court, where there is evidence reasonably supporting the judgment, we must take the plaintiff's theory of the case as established. He testified that he deposited these checks for collection as he would any other checks; that the cashier gave him credit therefor on his passbook, pending collection; that no notice of nonpayment was given him until about a month after the gin company failed, and many months after the checks were deposited for collection. The general rule is that when the amount of a check, left with a bank for collection, is credited to a depositor as cash, it may be charged back to him, in case it turns out to be worthless, unless the bank has been negligent, or has done something to mislead the depositor into acting, to his injury, on the faith of its goodness. *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. 386. The evidence shows that the Muskogee Gin Company was solvent and paying its obligations for several months after the plaintiff's checks were deposited for collection; and there is very little doubt

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that if the plaintiff had known the checks on the Bank of Porum were not collected he could have secured checks, in lieu thereof, drawn on the Bank of Commerce, which would have been paid on presentation. The bank's failure to collect the checks was not known to Ingram until eight or nine months after he deposited them for collection, and his account was not charged back with the amount thereof until twelve or thirteen months thereafter. The relation of principal and agent existed between plaintiff and defendant, and it was the duty of the agent to exercise reasonable care, skill, and diligence to make the collection; and its failure and neglect to do so render it liable to Ingram for any loss he may have sustained thereby. *Hobart Nat. Bank v. McMurrough,* 24 Okla. 210, 103 Pac. 601; *Bank of Big Cabin v. English,* 27 Okla. 334, 111 Pac. 386, *supra;* Mechem on Agency, secs. 511-518; Daniel on Negotiable Instruments (5th Ed.) sec. 327, p. 334. As we view it, there is but one question for determination, and that is whether the bank was negligent in the duty owed the plaintiff. We think there was sufficient evidence to sustain the finding of the court below on that question. The judgment of the court below is affirmed.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

BARNETT v. FREDERICK *et al.*

No. 1711. Opinion Filed May 14, 1912.

(124 Pac. 57.)

DIVORCE—Judgment—Construction. Section 6182, Comp. Laws 1909, which provides that "every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time," must be considered to apply only to that portion of section 6180 of the same chapter which relates to appeals and remarrying within six months following the date upon which the divorce was granted.

(Syllabus by the Court.)

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Error from District Court, Haskell County; Malcolm E. Rosser, Judge.

Action between May Barnett and J. W. Frederick and others. From the judgment, May Barnett brings error. Affirmed.

Brown & Lawrence, for plaintiff in error.

A. C. King, for defendants in error.

KANE, J. The only question involved herein is, Does a decree of divorce take effect so as to affect property rights before the expiration of six months from the day and date when such judgment was rendered? The court below answered the question in the affirmative, and we are of the opinion that its answer is correct. That has been the law in this jurisdiction for a great many years. In an opinion written by Chief Justice Dale in 1894, it was held that section 4553, p. 877, St. of Okla. 1893 (section 6182, Comp. Laws 1909), which provides that "every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time," must be considered to apply only to that portion of section 6180 of the same chapter which relates to appeals and remarrying within six months following the date upon which divorce was granted. *In re Smith,* 2 Okla. 153, 37 Pac. 1099. The Smith case was cited with approval in *Durland v. Durland,* 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959, where statutes identical with ours were construed and the same conclusion reached. The Supreme Court of Kansas has followed *Durland v. Durland, supra,* in *Philips v. Philips,* 69 Kan. 324, 76 Pac. 842; *Jacobs v. Gaskill,* 69 Kan. 872, 77 Pac. 550; *Woolverton v. Johnston,* 69 Kan. 708, 77 Pac. 559; *Cooper v. Bower,* 78 Kan. 156, 96 Pac. 59.

On the authority of the foregoing cases, the judgment of the court below is affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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BAILEY *et al.* v. ROWE *et al.*

No. 1718. Opinion Filed May 14, 1912.

(124 Pac. 282.)

1. **APPEAL AND ERROR—Review—Findings of Referee.** Where a cause is referred to a referee to find and report the facts, and no bill of exceptions is allowed and signed by the referee preserving the evidence, this court cannot on appeal consider any question affecting the sufficiency of the evidence to support the findings of the referee.

2. **BROKERS—Sale of Oil Leases—Compensation.** The owners of an oil and gas mining lease employed brokers to sell same within a stipulated period at a flat price, or for a price equal to $200 per barrel, average daily production of the wells then upon the lease as shown by a gauge thereof for ten days to be taken during the period of the contract. On the last day of the period of the contract, without having taken any gauge of the wells, the brokers presented to the owners a purchaser who offered to purchase at $200 per barrel average daily production as shown by a gauge for the time provided in the contract, which offer the owner accepted. **Held** that, by accepting said offer with knowledge that the gauge had not been made during the period of the contract, they waived the provision of the contract between them and the brokers providing for the gauge to be taken before the expiration of the contract.

(Syllabus by the Court.)

Error from District Court, Nowata County;
T. L. Brown, Judge.

Action by Fred S. Rowe and others against Fred D. Bailey and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

James C. Denton and *William S. Cochran,* for plaintiffs in error.

J. Wood Glass and *C. I. Weaver,* for defendants in error.

HAYES, J. This action was instituted in the court below by defendants in error, hereinafter called plaintiffs, against plaintiffs in error, hereinafter called defendants, to recover $700 with interest as compensation for services rendered in compliance

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with a written contract executed by defendants on January 16, 1907, whereby plaintiffs were employed or authorized for a stated period of time to sell for defendants two certain oil leases, said compensation as alleged in the petition amounting to $600, and also to obtain judgment for the return of $100 paid by plaintiffs to defendants under written contract executed December 10, 1908. The trial court found that plaintiffs were not entitled to recover the $100 last above mentioned, and from that decision no appeal has been prosecuted and said claim and the contract on which it is based may be eliminated from further consideration.

The cause was tried to a referee who, after hearing the evidence, reported findings of fact and conclusions of law upon which the trial court rendered judgment in favor of plaintiffs for the sum of $470 and costs.

Several propositions are urged in defendants' brief in this court for reversal of the cause. The first proposition is that the court erred in overruling defendants' demurrer to plaintiffs' evidence. The second and fourth propositions are that the court erred respectively in its sixth and eighth findings of fact.

None of the foregoing propositions can be considered by this court for the reason that no bill of exceptions preserving the evidence was allowed and signed by the referee. It is a well-established rule in this jurisdiction that where the cause is referred to a referee to find and report the facts and conclusions of law to the court, and no bill of exceptions is allowed and signed by the referee preserving the evidence, this court cannot on appeal consider any question affecting the sufficiency of the evidence to support the findings of the referee. *Render v. Hocker,* 26 Okla. 242, 108 Pac. 1105; *Pettis et al. v. McLain et al.,* 21 Okla. 521, 98 Pac. 927; *Campbell et al. v. Sherman,* 20 Okla. 185, 95 Pac. 238; *Wichita Mining & Imp. Co. v. Hale,* 20 Okla. 159, 94 Pac. 530.

It will not be necessary to set out in full in this opinion the exact language of the referee in his findings of fact. A statement of the substance thereof will be sufficient. A copy of

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the contract which forms the basis of this action is attached to plaintiffs' petition as an exhibit, and by the answer of defendants the execution of the contract is admitted, and that the copy thereof attached as an exhibit to the petition is true and correct. That contract was entered into between plaintiffs and defendants on the 16th day of January, 1909, and by it defendants contracted to sell and convey to plaintiffs, who are real estate brokers, or to any other person whom they might designate, two certain oil and gas mining leases mentioned and described in the contract for a consideration of $15,000 upon an estimate by them that the four wells then existing upon the leases would produce a daily average of 75 barrels of oil. But it is also agreed that, if plaintiffs desire to take a gauge of the wells, they may do so and purchase or sell said leases for a consideration to the defendants of $200 per barrel for the average daily production that a gauge of ten days of the wells may show. All the parties have treated the contract as one granting to plaintiffs an option to buy the property within the time specified in the contract, or as employing them to sell the property within said time upon the terms specified in the contract. The period of time during which plaintiffs had an option to purchase or sell said property was twenty-two days from the date of the contract. If a sale was made within that time, they were to receive as commission five per cent. in cash on the full amount of the purchase price. On the last day of the period provided for in the contract, plaintiffs submitted two propositions of sale to defendants, one of which was accepted; but later defendants refused to carry out their agreement to sell, and plaintiffs filed this suit to recover their commission.

The provision of the contract relative to taking the gauge of the wells is as follows:

"It is agreed and understood that said two parties (plaintiffs) shall have the privilege of entering upon the above described leases at any time before the expiration of this contract for the purpose of taking a gauge and not to exceed ten days of four wells now on said property to determine the average amount of daily production thereof."

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The exact language of the contract relative to the purchase price being determined by a gauge of the wells taken under the foregoing provision is as follows:

"In the event the four wells above mentioned should fail to produce seventy-five barrels per day for ten days during gauge as hereinbefore set forth, then the said parties of the first part agreed to sell the above described leases at a price based upon $200 per barrel for average daily production as shown during gauge."

No gauge of the wells was taken by plaintiffs during the term of the contract. On the last day of the period of the contract, plaintiffs found a buyer for the property who offered to purchase at a flat purchase price of $12,000, or at a purchase price equal to $200 per barrel for the average daily production under a gauge to be taken a sprovided in the contract. Plaintiffs informed defendants on the last day of the contract that they had a purchaser upon the foregoing terms, and defendants, as found by the court, agreed to accept the proposition for a sale at $200 per barrel, and said property was contracted by plaintiffs to the proposed purchasers at $200 per barrel. No gauge of the wells was taken by plaintiffs within the period of the contract. The referee, however, found as a conclusion of law "that, as a matter of law by agreeing to a sale of the property at $200 per barrel during the second option contract and on the last day of the option contract, defendants waived any right they might have had to require plaintiffs to take the gauge of the property during the life of said contract."

The foregoing conclusion of law by the referee, approved by the trial court, constitutes one of the propositions urged by defendants on this appeal for reversal. The language of the contract relative to when the ten days' gauge should be taken, whether the same must be completed before the expiration of the contract or might be begun during the period of the contract and completed afterwards, is ambiguous; but, if we assume as the trial court did that it requires the gauge to be taken before the expiration of the contract, we think the trial court com-

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mitted no error in holding that this condition of the contract was waived by defendants.

Plaintiffs on the last day of the contract presented two offers of purchase to defendants; one at a reduced flat price from that authorized in the contract, and the other in accordance with the provisions of the contract except that the gauge would have to be taken after the expiration of the contract, or at least taken in part after the expiration of the contract. Defendants, with knowledge that the second proposition was not in strict compliance with the contract, elected to accept it and did so; whereupon plaintiffs closed the contract with the proposed purchasers to sell to them under the second proposition, but within three days thereafter defendants, without assigning any reason as far as the finding of the referee shows, refused to complete the sale, and no gauge was ever taken. Defendants accepted the services performed by plaintiffs as a full compliance with the contract. If the contract in fact required that a gauge of ten days be taken before the expiration of the contract, then defendants would have been within their rights to have refused both propositions of sale submitted by plaintiffs, and would have been liable for no commissions for plaintiff's services; but they did not do this before the expiration of the time within which plaintiffs could have yet purchased the property at the flat price stipulated in the contract, and which they might have done rather than to have suffered the contract to result in an entire loss of the consideration paid therefor, or they might have procured some purchaser at the flat price stipulated in the contract. Defendants foreclosed them of this opportunity by accepting the offers of the proposed purchasers. Having accepted the acts of plaintiffs as a compliance with the contract, they cannot thereafter by refusal to carry out the contract on their part defeat plaintiffs of their right to compensation for their services. *Crowley Co. v. Myers,* 69 N. J. Law, 245, 55 Atl. 305; *Giles v. Swift,* 170 Mass. 461, 49 N. E. 737; *Ullmann v. Land,* 37 Tex. Civ. App. 422, 84 S. W. 294; *Stewart v. Fowler,* 53 Kan. 537, 36 Pac. 1002.

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It is a well-settled principle of law that, where a broker has performed his undertaking and procured a purchaser ready, willing and able to purchase at the price and upon the terms stipulated for by the owner, the broker is entitled to his commission and cannot be deprived thereof by the fact that the employer fails and refuses to consummate the transaction. There is no contention in this case that the proposed purchasers obtained by plaintiffs were not able, ready, and willing to carry out their part of the contract. The trial court did not therefore err in refusing to render, upon the referee's finding, judgment for defendants.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

AWAD v. SHOUSE.

No. 1726. Opinion Filed May 14, 1912.

(124 Pac. 26.)

1. **JUSTICES OF THE PEACE—Review of Decisions—Decisions Appealable—Final Judgment.** In a justice of the peace court, the jury having returned a verdict in favor of A. against S., and S. having moved for a new trial, which was by the justice overruled, without formal judgment having been rendered on said verdict, S. in due time appealed to the county court, executing a bond in due form. The transcript having been properly lodged in the county court, it was objected that the appeal would not lie, on the ground that no final judgment had been rendered in said action. **Held,** an appeal would lie only from a final judgment.

2. **SAME—Appeal and Error—Amendment in Appellate Court.** The entering of judgment on said verdict by the justice of the peace, being a ministerial act, at the seat of the county court, located without his justice precinct, it was permissible for such justice to enter in his docket the judgment on said verdict.

(a) It was also permissible for said justice at the seat of said county court to amend the transcript so as to show the rendition of judgment on said verdict.

(b) The transcript having been so amended, it had the effect, at least from that time, to confer jurisdiction on the county court over said action.

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(c) Neither any objection having been made as to the trial proceeding on the ground that the party was entitled to further time on the ground of such amendment to prepare for trial, nor as to the old bond, held no error in the trial court in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Ellis County Court;
A. E. Williams, Judge.

Action by B. F. Shouse against M. A. Awad. From a judgment of the county court reversing a judgment of the justice of the peace for defendant, he brings error. Affirmed.

C. B. Leedy, D. W. Anderson, and *W. A. Briggs,* for plaintiff in error.

Frank E. Ransdell and *L. E. Moyer,* for defendant in error.

WILLIAMS, J. This proceeding seeks to review the action of the lower court in a certain cause wherein B. F. Shouse, the defendant in error, was plaintiff, and M. A. Awad, the plaintiff in error, was defendant. The plaintiff sued in a justice of the peace court in replevin to recover the possession of two mules. After trial by jury, a verdict in due form was returned in favor of the defendant. A motion for new trial was overruled. No formal judgment was entered by the justice of the peace on said verdict. The plaintiff, by executing a bond as required by law, appealed to the county court; the transcript in due time being lodged in said court. In due time said cause was reached for trial in the county court. Under the issues as joined in the justice of the peace court, a jury was impaneled in the county court. The plaintiff was then sworn and examined as a witness. After he had been partially examined, the attorney for the defendant objected to the introduction of any evidence, for the reasons: (1) That the court was without jurisdiction to try said cause; (2) That no judgment was rendered in the justice of the peace court; and (3) that no judgment had ever been entered upon the verdict of the jury.

The verdict of the jury and when received; the judgment, specifying the items of cost included and the time when rendered;

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the issuing of the execution, and orders to sell, when issued, and to whom the renewals thereof, if any, were made; the return, and when made—must be entered on the docket by the justice. Section 6459, Comp. Laws 1909; section 4835, St. Okla. 1893.

It is insisted by the plaintiff in error that no appeal can be prosecuted from a justice of the peace court on a verdict rendered by a jury impaneled therein, unless judgment be rendered on such verdict. This contention has been decided by this court in favor of the plaintiff in error in *Barnes et al. v. Manis,* 29 Okla. 130, 116 Pac. 816.

The record recites that the justice of the peace before whom said cause had been tried "appeared in person in court and brought with him his docket, and in the courtroom wrote in his docket the following: 'In accordance with the findings of the jury, I award judgment for the defendant, that defendant have and recover from the plaintiff the possession of the property and the costs of this action. [Signed] J. H. Hubbard, J. P.' And thereafter wrote upon the transcript which had been filed in the court the following, to wit: 'Amend to agree with docket entries, in accordance with the findings of the jury, I award judgment for the defendant, that defendant have and recover from the plaintiff the possession of the property and the costs of this action. [Signed] J. H. Hubbard, J. P.' * * *" The case then proceeded. The place where the county court was located was not within the bounds of the justice precinct of said justice of the peace. To the amending of the docket and the amending of the transcript exceptions were saved. The entering of judgment upon the verdict and the amending of the transcript at least had the effect from that time of vesting jurisdiction in the county court. No complaint was made that a new bond should have been made; the old bond having been permitted to stand without objection. We are not disposed to reach out to find a technical reason for striking down the judgment of a trial court. Besides, it is a matter of common knowledge that justices of the peace, as a rule, are not learned in the law and are more liable to commit mistakes or have defects in their records

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than courts of record, and appellate courts should, especially in such matters, adopt a liberal construction to sustain their proceedings. There is evidence in the record reasonably tending to support the verdict. Such being the case, it has time and again been held by this court that on review here the same will not be disturbed.

The plaintiff in error insists that the court erred in refusing to give a certain instruction requested by him. Rule 25 (20 Okla. xii, 95 Pac. viii), of this court provides:

"Where a party complains of instructions given or refused, he shall set out *in totidem verbis* in his brief separately the portions to which he objects or may save exceptions."

This court has time and again held that, as to the giving or refusing of instructions, an assignment of error would not be considered unless this rule had been complied with. *Lynn et al. v. Jackson,* 26 Okla. 852, 110 Pac. 727; *Holmes v. Evans,* 29 Okla. 373, 118 Pac. 144; *Terrapin v. Barker,* 26 Okla. 93, 109 Pac. 931; *Ward v. Richards,* 28 Okla. 629, 115 Pac. 791.

It follows that the judgment of the lower court must be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

LAWTON PRESSED BRICK & TILE CO. *et al.* v. ROSS-KELLAR TRIPLE PRESSURE BRICK MACH. CO. *et al.*

No. 1728. Opinion Filed May 14, 1912.

(124 Pac. 43.)

1. **PLEADING—Allegations in General—Surplusage.** Where the facts constituting the pleader's cause of action are fully set out in his petition, and are followed by a formal statement of his conclusions drawn from the facts stated, such conclusions, if erroneous, may be disregarded as surplusage.

2. **FIXTURES—Annexation to Realty—Intention.** Chattels may be annexed to the real estate and still retain the character of per-

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sonal property. Of the various circumstances which may determine whether, in any case, this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule, they will not.

3. **SAME—Seller and Buyer of Chattels—Rights of Third Parties.** Certain brick manufacturing machinery was sold upon a written agreement between the parties that the title thereto should not pass to the vendee until the purchase price was fully paid; that the title thereto should not be affected by the delivery and erection thereof; that if default should be made in the payment of the purchase money the vendor should have the right to enter upon the premises, "wherever said machinery may be found and take possession thereof." In an action of replevin to recover possession of said machinery for nonpayment of purchase price, the evidence reasonably tended to show that the machinery was annexed to certain real estate belonging to the vendee, according to the terms of the contract, and that the mode of annexation was such that the removal thereof would not take away or destroy that which was essential to the support of the buildings, foundation, or walls, or other parts of the real estate to which it was attached, and that it would not destroy or of necessity impair the machinery itself. **Held,** that the agreement between the original vendor and vendee, fully expressing their distinct purpose that the annexation of the machinery should not make it part of the real estate, was sufficient to that effect, without any concurring intention on the part of a third person, who subsequently purchased the land from the purchaser of the machinery.

(Syllabus by the Court.)

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by the Ross-Kellar Triple Pressure Brick Machine Company against the Lawton Pressed Brick & Tile Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Stevens & Myers and *T. B. Orr.* for plaintiffs in error.

Harmon J. Bliss, Fred R. Ellis, and *W. B. Herod,* for defendants in error.

KANE, J. This was an action in replevin, commenced by the defendant in error Ross-Kellar Triple Pressure Brick Machine Company, plaintiff below, against the plaintiffs in error and the defendant in error First National Bank of Kansas City, Mo., and

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others, defendants below, to recover certain machinery sold and delivered by the Ross-Kellar Triple Pressure Brick Machine Company to the Lawton Pressed Brick & Tile Company, under a contract reserving the title in the vendor until the purchase price was fully paid. The pleadings consisted of the amended petition of the plaintiff to which was attached a copy of the contract of sale, the affidavit in replevin, and the answer of the defendants the Lawton Pressed Brick & Tile Company and the First National Bank of Lawton, which admitted the allegations of the petition as to the incorporation of the plaintiff, but denied each and every other statement in said amended petition contained, and prayed for a return of the property, and costs and damages for the taking thereof. The cause was tried before the court, without the intervention of a jury, and, after hearing the evidence, it found the issues in favor of the plaintiff and against the defendants, and rendered judgment that plaintiff was entitled to recover possession of the property described in its amended petition, together with its costs in said action, to reverse which this proceeding in error was commenced.

Counsel for plaintiffs in error, in their brief, argue: (1) The court erred in rendering judgment for the plaintiff below. (2) The court erred in refusing to render judgment for the defendants below. The first contention is based upon the theory that the plaintiff, in its amended petition, asserted a special interest and ownership in the property in controversy, and on the trial proceeded upon the theory of absolute or sole ownership. This contention cannot be sustained. The amended petition alleged, in substance, the execution of the written conditional sale contract, the substance and terms of which are set out in the language of the pleader, and, in addition, a verbatim copy of the contract is attached to the amended petition and made a part thereof. The petition further avers the recording of the contract, the sale and delivery of the property thereunder, the reservation of ownership in the vendor until the purchase price is paid, the manner of payment of the purchase price, plaintiff's title, plaintiff's right to possession in case of default by the Lawton Pressed

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Brick & Tile Company, the entire fulfillment of the contract by plaintiff, the default in payment by the Lawton company, the claim of interest of the defendants other than the Lawton company, and the demand upon all the defendants for delivery of the property in question, and their failure to deliver same. After pleading all these facts, and others, which are unimportant as connected with the question now under consideration, it is further alleged that the plaintiff "is entitled to the immediate possession of said property, and has a special interest and ownership therein, by reason of the execution, delivery, and recording of the written contract of sale and the facts aforesaid." It is on account of the allegation embraced within the above quotation marks that the contention that there is an inconsistency between the *allegata* and *probata* is based. That allegation is merely the conclusion of the pleader drawn from facts set out in the pleadings. Even if the conclusion drawn is erroneous, that circumstance would have no significance, as the pleadings must be viewed as an entirety, and not taken piecemeal. Moreover, the language complained of is not lacking in accuracy; it is averred, in substance, that the execution, delivery, and recording of the contract and the facts stated above gave the plaintiff a special interest and ownership. That we think is true. The interest or ownership cannot properly be declared to be general, as the ownership was not absolute; the sense of the contract of conditional sale being that, upon a full compliance with its terms by the Lawton company, a perfect title to the property in question should vest in the vendee. The cases cited by counsel for plaintiffs in error belong to that class of cases like *McMillan Hdw. Co. v. Ross,* 24 Okla. 696, 104 Pac. 343, wherein it was held:

"When the petition in a replevin suit alleges that the plaintiff is entitled to the possession of certain personal property by reason of a special interest therein, evidenced by certain notes and a chattel mortgage, and the proof shows that, if he is entitled to the possession thereof at all, it is by reason of a certain other agreement with the defendant, and timely objection is made to such variance between the pleadings and the proof, it is fatal to the recovery of the plaintiff."

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It seems clearly from what has been said that there is a marked distinction between the principles involved in the two cases.

The contention of counsel for defendants in relation to their second assignment is disclosed by the following excerpt from their brief:

"Admitting, for the sake of argument only, that as between the plaintiff and the defendant, Lawton Pressed Brick & Tile Company, the contract relied upon by plaintiff retained in the seller the sole and absolute title to the property until final payment, and that upon default in the payment the said defendant lost its claim in or right to the same, even to the extent that it did not have a redeemable interest therein, if the property became fixed to the real estate in such a manner that it became a part thereof, as to third parties purchasing the real estate, without actual notice of the contract, it would not be binding, even though it may have been filed as a conditional sale contract of personalty under the law relating to the filing of such contracts. We respectfully urge that the property attempted to be taken under the writ was a part of the real estate to which it was attached, being affixed thereto in such a manner that under our statute it became a part thereof, and especially is this true as to third parties, without notice, even though it may have been agreed between the plaintiff or its assignor and the defendant, Lawton Pressed Brick & Tile Company, that it should remain personal property."

We do not believe that this contention can be sustained. The same argument as to the effect of want of notice might be made in the case of a purchase of any class of personal property from one who holds possession thereof by virtue of a conditional sale contract, yet it has been uniformly held by the courts that the sale and delivery of personal property on condition that the title shall remain in the vendor until the purchase price is paid does not pass the title until the condition is complied with; and in case the condition is not complied with the vendor has the right to repossess himself of the goods, both against the vendee and his creditors, and if guilty of no negligence may recover the goods so sold, even from an innocent purchaser. *Lockwood Bros. v. Frisco Lumber Co.*, 22 Okla. 31, 97 Pac. 562; *Parmlee*

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v. Catherwood, 36 Mo. 479; *Griffin v. Pugh,* 44 Mo. 326; *Ridgeway v. Kennedy,* 52 Mo. 24. The decisions in that class of cases are based upon the doctrine that the conditional sale does not vest the title to the property in the purchaser; and therefore a purchaser from him acquires no better title to the chattel than his vendor. The Oklahoma case, above cited, arose in the Indian Territory prior to statehood, and defined the rights of the parties without regard to the statute of Oklahoma, which requires conditional sale contracts to be filed, in order to be valid "as against innocent purchasers, or the creditors of the vendee," which statute, we may say in passing, has no application to the case at bar. . The contract between the original vendor and vendee herein was that the title to the machinery should remain and be in the seller until fully paid for; that the title thereto should not be affected by the delivery and erection thereof; and that, if default should be made in the payment of the purchase money or any part thereof, the vendor or its assigns should have the right to enter upon the premises, wherever the machinery might be found, and take possession thereof. The purchaser of the land whereon the machinery was erected cannot be said to be an innocent purchaser of the chattel in any sense of the statute. If he acquired the machinery, he acquired it because it became part of the land by annexation and passed as real estate by conveyance. If the machinery retained its chattel character, notwithstanding the annexation, title thereto did not pass to the purchaser of the land, for the same reason that title did not pass in the above cases.

It is well settled that chattels may be annexed to the real estate and still retain the character of personal property. Of the various circumstances which may determine whether, in any case, this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule, they will not. The limitation to this is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy, as

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where the property could not be removed without practically destroying it, or where it, or part of it, is essential to the support of that to which it is attached. *Mott v. Palmer,* 1 N. Y. 564; *Ford v. Cobb,* 20 N. Y. 344; *Tifft et al. v. Horton et al.,* 53 N. Y. 377, 13 Am. Rep. 537; *Sword v. Low,* 122 Ill. 487, 13 N. E. 826; *Eaves v. Estes et al.,* 10 Kan. 314, 15 Am. Rep. 345; *Henkle et al. v. Dillon et al.,* 15 Ore. 610, 17 Pac. 148; *Godard et al. v. Gould et al.,* 14 Barb. (N. Y.) 662; *McEntee et al. v. Scott,* 2 Thomp. & C. (N. Y.) 284; *Young v. Baxter,* 55 Ind. 188. *Godard v. Gould, supra,* seems to be in all respects similar in principle to the case at bar. Godard sold mill machinery to one Stoddard, the title to remain in the vendor until fully paid for; and such machinery was installed in the mill of Stoddard, who afterwards made a deed to the real estate on which the machinery was situated to Gould. The action was brought by Godard against Gould to recover damages for the value of the machinery. In rendering the opinion of the court, Strong, J., says:

"By the terms of the contract between the plaintiffs and Stoddard, Freeman & Co., the machinery was to be set up in the mill of the latter, the plaintiffs furnishing a suitable person to superintend that business, and the plaintiffs were to remain the owners of it until it should be paid for. The machinery was set up in the mill according to the contract, and the evidence clearly shows that the mode of annexation was such that it could be removed without injury to the building; that the building would, after its removal, and without any labor or expense, be equally as well fitted and prepared to received other machinery of a similar kind as it was for the reception of that in question. Upon these facts, and a balance of the price remaining unpaid, I am satisfied the law is that the machinery did not by the annexation become part of the realty, but continued to be personal property, and to belong to the plaintiffs. In *Smith v. Benson,* 1 Hill, 176, it was held that a building for a dwelling or grocery, erected by one person on the land of another, with an understanding between them that it might be removed at any time, was not part of the freehold, but personal property. Cowen, J., by whom the opinion of the court was delivered, says: '*Prima facie* such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned

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may control the legal effect of any transaction between them by an express agreement.' In *Mott v. Palmer,* 1 N. Y. 564, the general principle that one man may own the soil, and another buildings and fixtures upon it, and that in such a case those erections will be personal property, is recognized, and *Smith v. Benson,* and several other cases, are referred to in support of it. See also, *Smith v. Jenks,* 1 Denio, 580; [*Jencks v. Smith*] 1 N. Y. 90. The deed of Stoddard and wife to the defendants did not affect the right of the plaintiffs to the machinery. The machinery being personal property, the grantors could not convey a greater interest in it than they had. It is not material whether or not it would have passed by the deed, without the special clause embracing fixtures, and as part of the land, but for the agreement that the plaintiffs should remain the owners; it was in either case personal property, belonging to others, whose title the grantors could not transfer. Nor does the fact that the defendants are *bona fide* grantees in the conveyance make any difference. The plaintiffs in no way consented to the conveyance; they have not practiced any fraud on the defendants; their equities are at least equal to those of the defendants; and the recording act has no application to the case. I am not aware of any principle upon which it could be held that the plaintiffs have lost their title."

Counsel for plaintiffs in error strongly rely on *Great Western Mfg. Co. v. Bathgate et al.,* 15 Okla. 87, 79 Pac. 903, to support their contention, and say in their brief that "the manner in which it [the machinery] is shown to have been affixed to the land brings it squarely within the case of *Great Western Mfg. Co. v. Bathgate.*" In that case the trial court found from the evidence that certain machinery attached to a gristmill thereby became a fixture, notwithstanding an unrecorded conditional sale contract. In that case the trial court found from the evidence that the machinery was so affixed to the realty as to become a part thereof; and the Supreme Court found that, from an examination of the entire record and all the evidence contained therein, there was evidence which clearly tended to support the finding of the trial court that this machinery was attached to the real estate and became a part thereof as a fixture. And this being true, under the oft repeated, well understood, and universally fol-

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lowed rule of this court, the finding of the trial court on this question of fact will not be disturbed.

In the instant case there was conflicting evidence as to the manner the machinery was attached to the soil, from which the trial court found the machinery still retained its chattel character, and under the rule above announced we are not at liberty to disturb that finding; the evidence reasonably tending to support it. Moreover, the two cases are distinguished in principle, as *Fifield v. Farmers' Nat. Bank of Princeton*, 47 Ill. App. 119, cited in support of the Bathgate case, and *Sword v. Low, supra*, from the same state, which supports this, or *McRea v. Central Nat. Bank*, 66 N. Y. 489, cited by Mr. Justice Irwin, who delivered the opinion in the Bathgate case, and *Goddard v. Gould* and the other New York cases cited therein. We think there is evidence reasonably tending to show that the machinery did not become a part of the buildings constructed to shelter it; that the removal thereof would not take away or destroy that which is essential to the support of such buildings, foundations, walls, or other parts of the real estate to which it was attached; that it would not destroy or of necessity injure the machinery itself. So the limitation hereinbefore stated does not apply. Hence we conclude that the agreement between the vendor and the brick company, fully expressing their distinct purpose that the annexation of the machinery should not make it part of the real estate, was sufficient to that effect, without any concurring intention on the part of a subsequent purchaser of the land.

The judgment of the court below is affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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PURCELL v. CORDER *et al.*

No. 1732. Opinion Filed May 14, 1912.

(124 Pac. 457.)

1. **PLEADING—Waiver of Objections—Departure.** Although the allegations of a reply may constitute a departure, yet the question of such departure cannot be taken advantage of by demurrer or objection to the introduction of evidence. The defendant, having failed to move to strike the reply on such ground, and going to trial on the issues thus framed, waived such defect.

2. **TRUSTS—Express Trusts—Validity of Oral Trust.** A pleading that is sufficient to withstand a demurrer under the statute of frauds is also sufficient under the statute of uses and trusts (section 7267, Comp. Laws 1909; section 4186, St. Okla. 1890).

3. **PLEADING—Demurrer—Admissions.** Although a demurrer admits the facts of a petition, the agreement being in parol, the defendant is entitled to the benefit of the statute of frauds, unless the part performance, which is set out therein to avoid its operation, is of a character to have that legal effect. The demurrer admits the parol agreement, and insists that it is not such a parol agreement as will avoid the operation of the statute, and deprive the defendant of the benefit of it as a defense.

4. **SAME—Demurrer—Admissions.** A defendant may answer and admit a parol agreement, but if, at the same time, he insists on the protection of the statute, no decree can be made against him merely on the ground of the admission of the agreement. A demurrer is, in effect, the same as an answer which admits the parol agreement, but claims the benfit of the statute. It admits the agreement, but denies the right of the complainant to enforce it.

5. **SAME.** If the petition alleges such a part performance as will take the agreement out of the statute, the demurrer is such an admission of the part performance as will preclude the defendant from the benefit of the statute. The petition must state the facts which are relied upon as part performance. When the facts are admitted by the demurrer, the court must determine whether the facts relied upon constitute a part performance.

6. **SPECIFIC PERFORMANCE—Frauds, Statute of—Operation of Statute—Performance by Plaintiff—Validity of Parol Trust.** E. C., the wife of W. C., held one-half of a certain 80 acres of land in trust for him. W. C. and his daughter, M. P. (plaintiff in error), agreed in parol with E. C., who was the stepmother of M. P., that the said W. C. should convey the other half of said 80 acres of land to E. C.; that M. P. should contribute and assist in the support of said W. C. and E. C. during their natural lives; that E. C. should have the use and rents and profits from said land during

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her natural life, and at her death M. P. should own the same, and that E. C. would execute in due time the proper instrument to effectuate the intention. E. C. died without executing a will or deed to that effect; in fact, executed no will or instrument whatever in favor of any one relative to said land. M. P. executed or completed her part of the contract by making contributions toward the support of her father and stepmother. **Held**, that M. P. may sustain a suit in equity upon such parol agreement after such performance for a specific performance of the contract against the other heirs.

(a) The complete performance of said contract on the part of the party seeking to avail herself of its benefits took the case out of the operation of the statute of frauds.

(b) Such a performance as would take the case out of the operation of the statute of frauds would also take it out of the inhibitions of the statutes of uses and trusts. (Section 7267, Comp. Laws 1909; section 4186, St. Okla. 1890.)

(Syllabus by the Court.)

Error from District Court, Pawnee County;
L. M. Poe, Judge.

Action by May Purcell against Henry Corder and others. Judgment for defendants, and plaintiff brings error. Reversed, with instructions to grant a new trial.

Biddison & Eagleton, for plaintiff in error.

George E. Merritt, for defendants in error.

WILLIAMS, J. On December 29, 1908, plaintiff in error, as plaintiff, commenced an action against the defendants in error, as defendants, alleging that she was the owner of and in the actual possession of a certain 80 acres of land in Pawnee county. The defendants answered that the title of said land was in Eliza Craft at the time of her death, which occurred on November 26, 1908; that the said Eliza Craft left as her sole and only heirs the defendants and certain others; that, by reason of said inheritance, said defendants were the owners in fee of an undivided four-sixths interest in and to said land; the plaintiff being the owner of an undivided two-sixths interest therein. Plaintiff replied by general denial, and further averred that she was the daughter of William Craft and the stepdaughter of Eliza Craft, both of whom were dead; that it was by the means of

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William Craft that said land was purchased, though the deed was made to William Craft and Eliza Craft jointly; that it was without consideration so far as Eliza Craft was concerned; that it was for the use and benefit of the said William Craft, the said Eliza Craft holding an undivided one-half interest in and to said premises as trustee for the use and benefit of the said William Craft.

Plaintiff further averred that she had contributed large sums of money for the support of the said William Craft and Eliza Craft, and continued said contributions for a long time after the death of the said William Craft and up to the death of the said Eliza Craft, and that a contract and agreement was made and entered into by and between William Craft, Eliza Craft, and the plaintiff that the said Eliza Craft should have the use and benefit of the said land during her life, and that plaintiff should have and own the land after the death of the said Eliza Craft; that the said William Craft carried out and executed his part of the contract by deeding said land to Eliza Craft, but did so without consideration therefor, except the promise from Eliza Craft that she would arrange the matter so the plaintiff in error could and would have said land after her death; that plaintiff ratified and joined in said contract, but the said Eliza Craft, though promising to do so, failed to make either a deed or a will carrying out her part of said contract; that the said Eliza Craft had the use and control of said land during her life and enjoyed the rents and profits thereof; that the said William Craft, Eliza Craft, and the plaintiff made said agreement in good faith, and that, when the said Eliza Craft enjoyed the use and profits of said land during her life, it became an executed contract or agreement between said parties, said agreement being in parol. Defendants having filed a demurrer to said amended reply, same was sustained; exceptions being saved. Plaintiff electing to stand on her pleadings, the court dismissed said action, and rendered judgment against the plaintiff in error. This proceeding is to review said judgment. The grounds of demurrer were (1) that the reply was a departure from the petition; and (2) that the reply did not state facts sufficient to constitute a cause of action.

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The question of the reply constituting a departure could not be raised by demurrer. *St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co.*, 23 Okla. 79, 99 Pac. 647. The defendants, having failed to move to strike the reply on the ground that it constituted a departure, waived such defect, if any. *St. Paul Fire & Marine Ins. Co. v. Mountain Park Stock Farm Co., supra; Wey et al. v. City Bank of Hobart et al.*, 29 Okla. 313, 116 Pac. 943.

In *Logan v. Brown*, 20 Okla. 334, 95 Pac. 441, 20 L. R. A. (N. S.) 298, it is said:

"The third proposition raised by the defendant is one most insistently argued and contended for both under the allegations of the demurrer and under the proof offered in the case, and the statute invoked is section 64, art. 4, c. 65, Wilson's Rev. & Ann. St. 1903, under the title of 'Uses and Trusts,' which provides as follows: 'No trust in relation to real property is valid, unless created or declared: First: By a written instrument, subscribed by the trustee (trustor) or by his agent thereto authorized by writing. Second: By the instrument under which the trustee claims the estate affected; or Third: By operation of law.' If the petition was good against the demurrer under the statute of frauds, it was also good under the provisions of the statute of uses and trusts. The former statute provides that the contract shall be invalid, and the latter statute provides that no trust in relation to real property is valid unless in writing; but the statute last referred to provides, in addition thereto, 'unless created or declared by operation of law.' Under this last provision, the courts have exercised very broad discretion in excepting and taking out of the operation of the statute many cases where accident, fraud, or mistake have intervened, and where it would be inequitable to allow the grantee to retain real property, title to which had been procured under a verbal promise. So that the demurrer must of necessity be overruled for the reason that the petition is not vulnerable owing to any of the deficiencies mentioned appearing on its face, as well as appearing that it is not a suit to enforce an unwritten trust in relation to real property."

In *Spangler et al. v. Yarborough*, 23 Okla. 806, 101 Pac. 1107, 138 Am. St. Rep. 856, the court canceled the deed on the ground of fraudulent intention at the inception of the contract. See, also, *Halsell et al. v. Renfrow et al.*, 14 Okla. 674, 78 Pac.

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118, 2 Ann. Cas. 286, and *McCoy v. McCoy*, 30 Okla. 379, 121 Pac. 176.

The wife originally held an undivided one-half of said 80-acre tract in trust for the husband. Section 7268, Comp. Laws 1909; section 4187, St. Okla. 1890; *Ingham v. Burnell et al.*, 31 Kan. 333, 2 Pac. 804. The deed to said 80 acres of land was made to William Craft and Eliza Craft jointly; the said William Craft paying the money. The allegations in the record are that Eliza Craft held "an undivided one-half interest in and to said premises as trustee for the use and benefit of the said William Craft." It is further averred that the plaintiff in error, May Purcell, contributed large sums of money for the support of the said William Craft and Eliza Craft, and continued said contributions for a long time after the death of the said William Craft, and up to the death of the said Eliza Craft, and that, under the verbal agreement made between the said William Craft, Eliza Craft, and the said May Purcell, the said Eliza Craft was to have the use and benefit of all of said land during her life, the said William Craft conveying the other undivided one-half to the said Eliza Craft pursuant to said agreement; that said contract was entirely performed on the part of the plaintiff in error and her father, William Craft, but that Eliza Craft died without executing the will or deed to comply with the contract on her part. In *Gupton et al. v. Gupton et al.*, 47 Mo. 37, it is said:

"That an agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding, is settled in this state by *Wright v. Tinsley*, 30 Mo. 389, where the subject is considered at length and the authorities reviewed. The statute of frauds is set up as a defense, inasmuch as the original agreement was not made in writing. But this defense will not avail for the obvious reason that the contract was in a great measure performed by both parties. The plaintiffs took Mr. and Mrs. Barnett to their house, and provided for them until they left. * * * Contracts like the one under consideration have been before the courts, and have uniformly been held to be valid when partially performed, and when the refusal to complete them would work a fraud upon the other party. * * * The cases of *Van Dyne v. Vreeland*, 11 N. J. Eq. 370,

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and *Davison v. Davison,* 13 N. J. Eq. 246, were both very similar to the present, and the verbal promises of the owners of the property were enforced for the reason that the services and support contracted for had been rendered."

In *Sutton et al. v. Hayden et al.,* 62 Mo. 101, it is said:

"Ordinarily it is the case that the remedial justice of a court of equity as administered by a decree for specific performance is invoked where the agreement respects land, and where such agreement in any other forum would be held void, as in contravention of the statute of frauds. But the jurisdiction of courts of equity is by no means circumscribed within such narrow boundaries. That beneficent jurisdiction is called into activity on numerous other occasions, where, but for its timely exercise, there would be either a partial or else an entire failure of justice. * * * In *Goilmere v. Battison,* 1 Vern. 48, the tenant in possession agreed with the heir at law, who had threatened to evict her, that, if she died without issue of her body, she would either give him £2,500, or leave him her land. She failed in any way to comply with her agreement, and died, having bequeathed her land to her second husband, who took without notice. Yet on bill brought by the heir at law the agreement was enforced against the husband. So, also, a contract to make mutual wills will be enforced if one of the parties has died, having made a will in conformity with the contract, and the survivor has enjoyed the benefit of the will thus made. Story Eq. Jur., sec. 785; *Dufour v. Periera,* cited in *Walpole v. Oxford,* 3 Ves., Jr., 412; Newl. on Contr., c. 6, p. 111; *Hinkly v. Simmonds,* 4 Ves., Jr., 160. And the fact that a will is ambulatory until the death of the testator does not all prevent the prevalence of the equitable rule which the above authorities enunciate; for it is competent for a person to bind his assets by his agreement, and his will in such case is the trustee for the performance of that which he has contracted. In the case at bar the same principle as above asserted seems to be clearly applicable. Nor is it regarded as any substantial obstacle to the relief sought that the mode whereby the property was to be transferred was not specified. The intention to transfer the property was the chief thing. The method by which the intended result was to be attained was wholly immaterial. The contract entered into might well have been discharged by deed or will. Fry. Spec. Perf. sec. 678; *Barkweather v. Young,* 4 Drew, 1. In the case last cited, where A. on marriage of his daughter with B. agreed to leave his daughter an equal portion with his other children, and the

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daughter having died during the lifetime of her father, leaving children, it was argued this circumstance operated as a discharge of the agreement by the act of God. But the vice chancellor ruled otherwise, holding that the agreement might have been performed in two ways, either by A. making provision for his daughter by will, or by his dying intestate; and, though the death of the daughter precluded performance in the first way, this should not exonerate the father from performance in the second, since it was at his option, his intention being clear to do a certain thing, to adopt one or the other of two modes. In *Rhodes v. Rhodes,* 3 Sandf. c. [N. Y.] 279, a similar objection met with a like fate. That case very nearly resembles the one before us. There two brothers owned a farm in common, as well as stock, farming utensils, etc. One of the brothers, becoming by reason of epileptic fits incapacitated for labor, and requiring constant attention, agreed with his brother, on condition of receiving the proper support, care, and attention, that the latter should be compensated with all his property, both real and personal. This agreement having been faithfully complied with, it was held that the objection was not tenable that the agreement was mere parol. And it was further held that the services there contracted for could not and were not intended to be compensated for in money, and, in short, were incapable of computation by any pecuniary standard. Browne, Stat. Fr., sec. 463, cas. cit. The same remarks will apply with equal force here."

See to the same effect, in support of the right of specific performance as to wills, *Mundorff et ux. v. Kilbourn et al.,* 4 Md. 459.

In *Johnson v. Hubbel,* 10 N. J. Eq. 332, 66 Am. Dec. 773, it is said:

"It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. In the case of *Rivers v. Executors of Rivers,* 3 Desaus. [S. C.] 195 [4 Am. Dec. 609], the court in sustaining the propriety of a court of equity's recognizing and enforcing such an agreement very properly remarked that a man might renounce every power, benefit, or right which the law gives him, and he will be bound by his agreement to do

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so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral. In *Izard v. Executor of Izard,* 1 Desaus. [S. C.] 116, there is a note to the case in which most of the old authorities bearing upon this subject are collected. There are two classes of authorities there collected, one of which relates to the subject of agreements by two parties to make mutual wills in favor of each other on certain contingencies; and the other, in which courts of equity have decreed the specific performance of agreements connected with the testamentary or other settlements. In addition to the cases cited in this note, I would refer to the case of *Lord Walpole v. Lord Oxford,* 3 Ves. 402, and the same case in 7 D. & E. 138, and *Lewis v. Maddocks,* 6 Ves., Jr., 150, *Fortescue v. Hannah,* 19 Ves. 71, and a note in which a report of the case of *Jones et ux. v. Martin,* 3 Anst. 882, is given at length. *Podmore v. Gunning,* 9 Sim. 644; *Moorhouse v. Colvin,* 9 E. L. & E. Rep. 136. * * * Several objections are made to the court's decreeing a specific performance in this case, in addition to the general one which I have considered. It is said that this agreement was in parol, and is therefore contrary to the statute of frauds. But although this agreement was a mere parol one, if there was a part performance of it, of such a character as, upon the principles recognized and acted upon by this court, will take a parol agreement out of the statute, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. If one party to a parol agreement has wholly or partially performed it on his part, so that its nonfulfillment by the other party is a fraud, the court will compel a performance. In this case the son performed his part of the agreement. He paid a valuable consideration, and parted with his property. In fact, everything was done and performed by both parties that the character of the transaction would admit of. The part of the agreement which the son was to perform was to be performed *in praesenti,* and that part to be performed by the father was to be performed *in futuro.* There is no uncertainty about the agreement in the slightest respect. It is definite and certain in every particular. It is specifically set out by the complainant in his bill, and the agreement, as alleged, is admitted by the demurrer. There is no objection to a decree on the ground of the contract not being in writing."

In *Van Dyne v. Vreeland,* 11 N. J. Eq. 370, the facts are substantially the same as in the case at bar. In the opinion by the chancellor, it is said:

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"The agreement upon which the bill is founded was in parol, but its performance, or part performance, is set up to avoid the statute. Although the demurrer admits the facts of the bill, the agreement being in parol, the defendant is entitled to the benefit of the statute, unless the part performance, which is set up to avoid its operation, is of a character to have that legal effect. The demurrer admits the parol agreement, and insists that it is not such a parol agreement as will take the case out of the operation of the statute of frauds, and deprive the defendant of the benefit of it as a defense. A defendant may answer and admit the parol agreement; but, if at the same time he insists on the protection of the statute, no decree can be made against him merely on the ground of the admission of the agreement. A demurrer is in effect the same as an answer which admits the parol agreement, but claims the benefit of the statute. It admits the agreement, but denies the right of the complainant to enforce it. But, if the bill alleges such a part performance as will take the agreement out of the statute, the demurrer is such an admission of the part performance as will preclude the defendant from the benefit of the statute. The bill must state the facts which are relied upon as part performance. When the facts are admitted by the demurrer, the court must determine whether the facts relied upon do constitute part performance. In this case, if the agreement, which is the ground of the bill, is of such a character as could be enforced by either party if it were in writing, then, I think, there can be no doubt but that there has been such a part performance in this case by the complainant as will take the agreement out of the operation of the statute."

In *Davison v. Davison,* 13 N. J. Eq. 246, it was held:

"A father made a verbal agreement with his youngest son that if he would remain and work his farm, and support and maintain him during his life, that upon his death the son should have the farm. The son remained and worked the farm for upwards of fifteen years, to the satisfaction of the father, who then, becoming displeased with him, conveyed the farm to his other two sons, in consideration of maintenance for life. *Held,* that as it appeared that the complainant's services were rendered to his father not gratuitously, but upon a distinct understanding between himself and his father that he should be compensated for his services, and that the material part of that agreement was that upon his father's death, provided he continued to serve and provide for him during his life, he should receive the homestead farm, that the agreement thus proved was valid in law

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that part performance took the case out of the operation of the statute of frauds."

See, also, Fry on Specific Performance, 1884, sec. 223.

The judgment of the lower court is reversed, with instructions to grant a new trial and proceed in accordance with this opinion.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

JAMIESON v. CLASSEN CO. *et al.*

No. 1736. Opinion Filed May 14, 1912.

(124 Pac. 67.)

APPEAL AND ERROR—Review—Discretion—Grant of New Trial. The granting of a new trial being so much within the discretion of the trial court, this court will not reverse an order of such court granting a new trial unless error is clearly established in respect to some pure, simple, and unmixed question of law.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Annie M. Jamieson against the Classen Company and others. Verdict for plaintiff. From an order granting a new trial, plaintiff brings error. Affirmed.

Giddings & Giddings, for plaintiff in error.

Shartel, Keaton & Wells, for defendants in error.

WILLIAMS, J. The plaintiff in error sued the defendants in error the Classen Company and Sewell G. Bennett in the district court of Oklahoma county for slanderous words uttered by the said Bennett concerning her while, as claimed by her, he was in the employ of the Classen Company and acting within the scope of his employment. The plaintiff in error will hereinafter be referred to as plaintiff, and defendants in error as defendants.

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The cause was tried with the intervention of a jury, and a verdict returned in favor of plaintiff in the sum of $1,000 against both defendants.

In due time a motion for new trial was filed on the grounds (1) verdict contrary to law; (2) not sustained by sufficient evidence and contrary to the weight of the evidence; (3) error in the assessment of the amount of recovery, the same being too large; (4) excessive damages appearing to have been given under the influence of passion and prejudice; (5) error in refusing to give certain instructions requested by defendants, to which ruling of the court in refusing same exceptions were duly saved; (6) error of law in instructing the jury, especially in giving instructions numbered 4, 6, and 9, to the giving of which instructions the defendants at the time duly excepted; (7) errors of law occurring at the trial and duly excepted to by the defendants at the time. This motion was sustained and a new trial granted, to which exceptions were duly saved. By this proceeding in error the plaintiff in error seeks to review this action of the lower court.

It has time and again been held by this court that it will not reverse the ruling of the trial court granting a new trial unless it can be seen beyond all reasonable doubt that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made. *Ardmore Lodge No. 9, I. O. O. F., v. Dawson et al., ante,* 124 Pac. 66, and the authorities therein cited.

The record does not disclose upon what grounds the new trial was granted. The second, third, and fourth grounds relate to matters involving the discretion of the trial court.

Though the evidence may have been conflicting and on review here this court might be of the opinion that it justified the finding of the jury, yet it was within the province of the trial judge, after hearing said evidence, to disagree with the findings of the jury under such a status and set aside the verdict and grant a new trial. Such power is lodged with the trial courts,

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and its exercise under such circumstances may not be disturbed by this court.

It follows that the judgment of the lower court in granting a new trial will not be disturbed. Affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

STAPLETON *et al* v. O'HARA *et al.*

No. 1743. Opinion Filed May 14, 1912.

(124 Pac. 55.)

APPEAL AND ERROR—Review—Grounds of New Trial. On an action brought to recover on a foreign judgment, the court denied defendants the right to amend their answer by pleading the statute of limitations and on a trial rendered judgment against them. On reconsidering the case on the presentation of a motion for a new trial, the court granted the same without assigning any reason therefor. The presumption obtains in this court that judgments and orders of trial courts are correct; and where discretion is exercised, except where the abuse thereof is affirmatively shown, the same will not be disturbed on appeal.

(Syllabus by the Court.)

Error from Okmulgee County Court;
M. M. Alexander, Judge.

Action by Edward Stapleton and John Wilder against H. C. O'Hara and others. Verdict for plaintiffs. From an order granting a new trial, they bring error. Affirmed, and remanded.

G. E. Cassity, for plaintiffs in error.

DUNN, J. This case presents error from the county court of Okmulgee county. From an order granting defendants a new trial, plaintiffs have brought the case to this court for review. The action is brought to recover on a foreign judgment. To plaintiffs' petition defendants filed an answer consisting of a general denial. Thereafter, without consent of the court, they filed an amended answer setting up that the plaintiffs' action

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was barred by the statute of limitations for the reason that more than one year had expired since the right of action had accrued. Thereafter plaintiffs filed a motion to strike the said amended answer from the files, which, after a hearing, the court granted, and the cause came on regularly for trial on the original answer. Trial was had to the court, which rendered judgment in favor of plaintiffs, and a motion for new trial was filed by defendants and by the court granted, from which order plaintiffs have lodged the case in this court for review.

We are asked to reverse the order of the court granting a new trial. The record before us discloses that the only evidence offered on the hearing was the duly certified record of the judgment, which appears in all particulars to be formal. The sufficiency thereof presents but a pure, unmixed question of law, and if the judgment rendered on this evidence was the only action of the court upon which a new trial was asked, the same would be reviewed, and the order granting the same might be set aside. But, as stated above, the court struck from the files the amended answer of defendants setting up the statute of limitations. Orders made on application for leave to amend pleadings are largely in the discretion of the trial court, and this is always true where it is in furtherance of justice. Section 5679, Comp. Laws 1909. Although a plea of the statute of limitations has been denominated an unconscionable defense, and formerly the defendant would not be allowed as a matter of favor to plead the same after the time for pleading it as a matter of right had elapsed, the rule was not always approved even where it was followed, and it is now very generally abandoned or so far modified as to commit the allowance or disallowance of the amendment to the discretion of the court, and, where the court has acted, the conclusion which it reaches will not be reviewed and reversed except upon an affirmative showing of abuse. *Whercatt v. Worth et al.*, 108 Wis. 291, 84 N. W. 441, 81 Am. St. Rep.. 899; *Macgerlin v. City of Chicago*, 237 Ill. 159, 86 N. E. 670; *Houts et al. v. Bartle et al.*, 14 S. D. 322, 85 N. W. 591; *Phoenix Ins. Co. v. Dankwardt et al.*, 47 Iowa, 432; *Cooke v. Spears*, 2 Cal. 409, 56

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Am. Dec. 348; *Mitchell v. Cotten, Executor,* 3 Fla. 134; *Lange v. Union Pac. R. Co.,* 126 Fed. 338, 62 C. C. A. 48. The presumption accompanying the order granting a new trial in this case is that the court acted correctly. The fact that, in the exercise of its discretion, it denied the amendment, did not preclude it on a reconsideration of the case at the same term to review its action, if in the furtherance of justice it deemed it proper. As the reasons for allowing the new trial are not set forth, and the record presents the foregoing as a reasonable basis for its action to sustain the judgment and order rendered, it will be presumed here that it was on this that the court acted.

The order granting a new trial is therefore affirmed, and the case remanded.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

HAMILTON *et al.* v. OKLAHOMA TRADING CO. *et al.*

No. 1755. Opinion Filed May 14, 1912.

(124 Pac. 38.)

MASTER AND SERVANT—Injuries to Third Persons—Who Are Servants. Laborers engaged to use their employer's truck and to truck a car load of flour from the sidewalk into a building are servants, and not independent contractors.

(Syllabus by the Court.)

Error from District Court, Greer County;
G. A. Brown, Judge.

Action by C. P. Hamilton and H. Mathewson against the Oklahoma Trading Company and the El Reno Wholesale Grocery Company. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with instructions.

Powers & Powers, for plaintiffs in error.

C. C. Wells, for defendants in error.

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DUNN, J. This case presents error from the district court of Greer county. Plaintiffs in error, plaintiffs below, brought their action against defendants, praying damages in the sum of $60, with interest, alleged to have been occasioned through the negligence of defendants' employees or servants in breaking a large plate glass in plaintiffs' building. To this petition defendants filed a general denial, and upon the issues thus joined, a jury being waived, the cause came on for trial before the court, which rendered judgment for defendants. Motion for new trial was filed and overruled and exception allowed, and the cause has been lodged in this court for review.

The findings of fact upon which the trial court rendered judgment were as follows:

"(1) The plaintiffs at the time of the accident were the owners of a store building in Mangum, Greer county, Oklahoma, known as the 'Dixie Store Building.'

"(2) The plaintiffs had leased the east room on the ground floor of said building to the defendant, Oklahoma Trading Company, who was occupying said room as a grocery store, and had leased the west room on the ground floor of said building to one George E. Clark, who was occupying said room as a dry goods store.

"(3) The defendant Oklahoma Trading Company was a concern owned wholly and solely by the defendant El Reno Wholesale Grocery Company, and was under the direct control and management of the El Reno Wholesale Grocery Company.

"(4) The defendant Oklahoma Trading Company received a car load of flour, and was having the same stacked on the outer edge of the sidewalk in front of the room leased by it, and in front of the east half of the room leased by said George E. Clark.

"(5) The manager of the Oklahoma Trading Company, G. E. Baker, made a contract with two colored men, Will Hunter and Jim Johnson, to truck the flour from the sidewalk into the building, and authorized the negroes to use its trucks.

"(6) The defendant Oklahoma Trading Company agreed to pay the negroes $3 to truck the flour from the sidewalk to the store.

"(7) Hunter and Johnson were paid $3 according to contract for trucking the flour in. This was paid solely in consideration of the manual labor in moving said flour. There were no

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other specifications in the contract and no other directions given for or during its performance.

"(8) There was a large plate glass window in the east side of the building occupied by the said George E. Clark, which was inserted in a recess about eighteen inches from the property line.

"(9) There was an ordinary table six or seven feet long and about three feet wide situated immediately in front of the glass window and extending into the sidewalk about eighteen inches, on which Clark displayed his clothing.

"(10) The sidewalk between the glass and flour was about ten feet wide.

"(11) Will Hunter, while moving the flour with defendants' trucks, negligently stumbled, lost his balance, fell against the table, and caused the table to break the glass, which at the time of the accident was entirely concealed from view by advertising and display curtains and cloth. There was sufficient room between the flour on the outer edge of the sidewalk and the table in front of the glass for the removal of the flour with perfect safety to the window.

"(12) The city ordinances of Mangum, Okla., authorize merchants receiving goods to stack them in front of buildings, but require removal of said goods within reasonable time.

"(13) The glass was totally destroyed, and plaintiffs were forced to replace said glass at a cost to plaintiffs of sixty ($60) dollars, a reasonable cost.

"(14) Neither the Oklahoma Trading Company, or its agents or servants, received any permission from the plaintiffs or from Clark to stack said flour on the sidewalk, but no objections were made thereto.

CONCLUSIONS OF LAW.

"(1) The contract G. E. Baker made with Hunter and Johnson made the negroes independent contractors.

"(2) There was not such a duty imposed on the Oklahoma Trading Company to remove said flour at the time of the accident as to impose any liability on it for the damage resulting from the negligence of such independent contractors.

"(3) The plaintiffs take nothing by this action, and that the defendants recover their costs."

A number of errors are assigned and argued at length in the brief of counsel for plaintiffs in error, but from the view which we take of the case the sole question to be considered is whether the contract made by Baker with the two negroes constituted them

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independent contractors. As a general rule, the line of demarcation between an independent contractor and a servant is one not clearly drawn by the courts. The question must be determined upon the facts peculiar to each case. *Kniceley v. West Va. Midland R. Co.*, 64 W. Va. 278, 61 S. E. 811, 17 L. R. A. (N. S.) 370. However, in all cases in which the facts were similar to those in the case at bar, the courts have uniformly held that such laborers are servants and not independent contractors. See 1 Thompson on Negligence, sec. 630 *et seq.*; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764; *Brackett v. Lubke*, 4 Allen (Mass.) 138, 81 Am. Dec. 694. See, also, note to case of *City of Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 65 L. R. A. 445, 99 Am. St. Rep. 879, and *Kniceley v. West Va. Midland Ry. Co., supra; Chas. T. Derr Const. Co. v. Gelruth*, 29 Okla. 538, 120 Pac. 253.

The Court of Appeals of Missouri in the case of *O'Neill v. Blase, supra*, stating the facts and commenting upon the case of *Waters v. Fuel Company*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564, said:

"The employee claimed to be an independent contractor was a teamster who delivered coal for defendant at so much per ton. He owned the team and running gear of his wagon, while defendant furnished him the wagon box. The injury complained of occurred from his carelessness in failing to properly close a coal hole on certain premises, where, under the agreement aforesaid, he had delivered coal to a customer of defendant. In a careful review of the law Judge Vanderburg said that, in determining the question whether the relation of the teamster and employer was that of master and servant, it was not material whether the former was 'paid by the load, by the hour, or by the day, for his work.'"

And the case of *Holmes v. Railway Company*, 49 La. Ann. 1465, 22 South. 403, the Missouri Court of Appeals in the case of *O'Neill v. Blase, supra*, reviewed as follows:

"Plaintiff was injured by the carelessness of one Seals, employed by the agent of the defendant company to unload coal cars at $1.50 or $2.50 a car. Seals was not controlled in unloading the cars. At the time of the injury, while thus unloading coal for a brewery on the levee in New Orleans, he carelessly threw a

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heavy board from a car and injured plaintiff. The employee owned his shovel, and occasionally employed a hand to help him. The court held that Seals was not an independent contractor, but merely a servant of the railway company. In making that ruling it was said to be immaterial that he was paid by the car for his work. The court further held that persons working by the piece are not necessarily independent contractors. The criterion of responsibility was considered to depend on the nature of the work and the relation of the parties as ascertained by the circumstances of the case."

In the case last above quoted from it is to be noted that the employee owned the shovel with which he unloaded the coal, while in the case at bar the employees used the trucks of the defendants in trucking the flour from the sidewalk into the building. Under all the authorities, it must be held that these employees were simply servants and not independent contractors; hence the cause is reversed and remanded, with instructions to grant plaintiffs a new trial.

HAYES, WILLIAMS, and KANE, JJ., concur; TURNER, C. J., absent and not participating.

HERCULES BUGGY CO. v. HINDE.

No. 1756. Opinion Filed May 14, 1912.

(124 Pac. 27.)

EVIDENCE—Parol Evidence—Varying Written Contract. Where a party, on the sale of an article, makes representations amounting to a warranty, and the sale is consummated by a written agreement with a clause of warranty inserted, the vendee, in an action for breach of said contract, is not permitted to show the representations and assertions made previous to the execution of the instrument, in order to prove a warranty additional to that set out in the written agreement, as the execution of said contract in writing superseded all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of said instrument.

(Syllabus by the Court.)

Error from Noble County Court;
H. E. St. Clair, Judge.

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Action by the Hercules Buggy Company against A. C. Hinde. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Chas. R. Bostick, for plaintiff in error.

P. W. Cress, for defendant in error.

WILLIAMS, J. The plaintiff in error, hereinafter referred to as plaintiff, declared in his amended petition against the defendant in error, hereinafter called defendant, on two counts: (1) That defendant, on March 15, 1907, gave the plaintiff a written order for thirty-one buggies and carriages, at an agreed price of $1,390.55, which were delivered in accordance with the terms of said contract, and which were accepted by said defendant; that there had been paid on said buggies and vehicles the sum of $1,000, leaving a balance due thereon of $390.55; (2) that on September 11, 1907, plaintiff sold and delivered to defendant certain goods, wares, and merchandise, therein specifically described, to the amount of $22.90, which defendant failed and refused to pay. Defendant answered by general denial, and further pleaded for damages on account of misrepresentations made prior to and contemporaneous with the entering into of the written contract. The plaintiff filed a reply, and under the issues thus joined a trial was had.

Defendant attempted to prove written misrepresentations by a certain letter written by one of the plaintiff's traveling salesmen some time prior to the time the contract was entered into. This letter was offered in evidence by the defendant, but excluded on the objection of plaintiff; and that question is not presented in this record for review.

The written order or contract is as follows:

"The Hercules Buggy Co., Evansville, Indiana. Post Office: Perry, Okla., 3-15-1907. No.———. Rush Rush. Ship to A. C. Hinde, at Perry, Okla. Agent: Guy Cooper. When to ship: As soon as ready, via Frisco. Terms: Note due 60 days. Pay no money to agents. [Here follows an itemized description of the buggies and carriages to the number of thirty-one, with the prices set out, and which totals $1,390.55. This part of the contract contains in minute detail the catalogue numbers, the kind

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of bodies, springs, gear, paint, upholstering, and other matters descriptive of the various vehicles.] These jobs must be the equal of Banner at the same price, and if necessary will pay $1.00 per job more to get good wheels if you think necessary and important. Not subject to countermand. Subject to approval of the Hercules Buggy Co. All terms and conditions must be written on this blank. [Signed]

"A. C. HINDE."

The evidence showed that the word "Banner," as used in said contract or warranty, was thoroughly understood by the defendant, as well as the plaintiff; that the Banner buggy was a buggy made at St. Louis by Gardner Banner Buggy Company.

The plaintiff assigns error as follows: (1) In overruling motion for new trial. (2) In admitting evidence on the part of defendant over the objection of plaintiff. (3) Error in giving instructions 3 and 6.

The paper writing or order purports to set out the entire contract. *Holmes v. Evans,* 29 Okla. 373, 118 Pac. 144.

The plaintiff, in its brief, states as follows:

"The defendant was permitted, over the objection of plaintiff, to testify that Mr. Cooper, the agent of plaintiff, represented to defendant that the Hercules buggies were the best buggies on the market; that the wheels were made of the very best hickory, the beds of choice yellow poplar, side curtains wool lined, etc.; and that Cooper would guarantee them to be $10 better than any work that defendant had on the floor. These statements were made in Kansas City, Mo., prior to the 15th day of March, 1907, the date of the order. Defendant states that he did not order any buggies at this time, but waited until Mr. Cooper came down. The trial court then permitted the defendant, over the objection of plaintiff, to testify to and introduce evidence as to oral statements made to defendant by Cooper on the day of the sale and execution of the contract. These statements were to the effect that Cooper still guaranteed the Hercules buggies to be $10 better than any buggy that defendant had on the floor, and at the same time permitted defendant to show that at that time he had Banner buggies on the floor."

If the evidence which was offered and admitted contradicts, changes, or adds to the terms of the written contract, the same was erroneously admitted.

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Section 1090, Comp. Laws 1909 (section 781, Wilson's Rev. & Ann. St. 1903; section 822, St. Okla. 1893), provides that "the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." This is substantially declaratory of the common-law rule. *Southard v. Arkansas Valley & Western Ry. Co.*, 24 Okla. 408, 103 Pac. 750.

"The execution of a contract in writing supersedes all the oral negotiations or stipulations concerning its terms and subject-matter which preceded or accompanied the execution of the instrument, in the absence of accident, fraud, or mistake of fact; and no representation made prior to or contemporaneous with the execution of the written contract is admissible to contradict, change, or add to the terms plainly incorporated into and made a part of the written contract." (*Holmes v. Evans*, 29 Okla. 373, 118 Pac. 144; *Southard v. Arkansas Valley & Western Ry. Co., supra; Threlkeld et al. v. Steward et al.*, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; *McNinch v. Northwest Thresher Co.*, 23 Okla. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Guthrie & Western R. Co. v. Rhodes*, 19 Okla. 21, 91 Pac. 1119, 21 L. R. A. [N. S.] 490; *Garrison v. Kress*, 19 Okla. 433, 91 Pac. 1130; *D. M. Osborne & Co. v. Walther*, 12 Okla. 20, 69 Pac. 953; *Liverpool, etc., Ins. Co. v. Richardson Lumber Co.*, 11 Okla. 579, 69 Pac. 936.)

In *Peltier v. Collins*, 3 Wend. (N. Y.) 466, 20 Am. Dec. 711, it is said:

"In the case of *Powell v. Edmunds*, 12 East, 6, it is said that a warranty as to the quantity of timber would vary the agreement contained in the written conditions of a sale. The warranty is almost as important a part of the contract as the price or the designation of the articles sold, and equally so with what relates to the delivery or the credit. If we would avoid confusion, it should be recollected that we are not endeavoring to ascertain what is necessary to be stated in declaring upon a contract properly made, but whether a warranty is a substantial part of it. * * * Suppose the contract had been with warranty, and the memorandum in the plaintiff's salesbook had been signed by the defendant, but the warranty clause omitted, and suppose the rice had been delivered, and had proved to be of an inferior quality, could the defendant have shown the warranty by parol? The authorities to which I have referred show most abundantly that

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he could not. Is the rule of proof different where the memorandum is subscribed by the agent? Most certainly not. To show that the defendant was bound by the contract made by his agent, the judge admitted parol evidence that there was a warranty, and the jury found that the agent had authority to make a contract with warranty; yet, if the defendant had recognized the contract, it would have been to him a contract within the statute, and therefore void, or a contract without warranty, because he would have been confined to the written memorandum to show its terms."

In *Van Ostrand et al. v. Reed,* 1 Wend. (N. Y.) 431, 19 Am. Dec. 529, it is said:

"Suppose one man sells to another a horse. He represents him sound, and gentle, and useful; but a bill of sale is given in writing, which contains a bare transfer of the animal, without any warranty or engagement as to the soundness or good qualities of the horse; could the purchaser in that case go back and prove the representations and assertions made before the execution of the bill of sale? I think not. Where a contract has been consummated by writing, the presumption is that the writing contains the whole contract. If I am correct in this, then the plaintiffs have failed to prove the warranty. On the main question, whether the improvement was a valuable one, I am of opinion that the evidence was in favor of the plaintiffs. The machine they purchased, made according to the specification, was worthless. This was not contradicted by proving that a horse power machine under the same patent was a valuable improvement; but this evidence was irregularly before the jury—a warranty not being properly proved."

In *Reed v. Wood,* 9 Vt. 285, it is said:

"It is also a familiar principle that no parol evidence is admissible to vary or alter a written contract, or to add a new stipulation or condition thereto, when the parties have reduced their contract to writing. Neither can the parties give parol evidence of such contract, although the written contract may be inadmissible in evidence for want of a stamp. Whenever there is a sale, and either a bill of sale or a sale note given, such bill or sale note is the evidence of the contract, and cannot be varied. The cases of *Hodges v. Drakeford,* 1 New Rep. 270, *Rolleston v. Hibbert,* 3 Term Rep. 406, and *Gardiner v. Gray,* 4 Camp. 144, fully establish this principle. The bill, executed by Train & Co. to Wood, in January, 1832, was a sale note, or bill of sale, and, as such, evidence of the contract. It described the property sold;

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that it was bought by Wood of them, and they had received their pay therefor. It was the proper and legitimate evidence of the sale, and of the terms and conditions thereof. If a warranty of the quality of the property, then sold, had been contemplated by the parties, it should have been inserted in the writing then executed. To admit parol evidence of a warranty would in effect be to require that one part of a contract should be proved by the writing, which was executed, and to permit another, and an essential part of the same contract, to be proved by parol. This, we think, could not be permitted; and the result is that it was not competent for the defendant to prove an express warranty by the deposition introduced."

It was competent to introduce evidence as to the character and kind of the Banner buggy; for the buggies were sold and warranted under the written agreement to be equal to the Banner buggy. If the buggies sold and delivered to the defendant were not equal to the Banner buggy, then there was a breach of warranty, and the defendant was entitled to damages for such breach.

Instructions numbered 3 and 6 were erroneous, in that they submitted the question of the parol misrepresentations to the jury for their consideration in arriving at a verdict.

The judgment of the lower court is reversed and the cause remanded, with instructions to grant a new trial and proceed in accordance with this opinion.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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ALLEN v. MIDWAY OIL & GAS CO.

No. 1864. Opinion Filed May 14, 1912.

(124 Pac. 296.)

OIL AND GAS LEASE. Same as that in **Cedric Duff et al. v. Harwood Keaton et al., post,** 124 Pac. 291.

(Syllabus by the Court.)

Error from District Court, Rogers County; John J. Shea, Assigned Judge.

Action by Estella M. Allen, by Charles W. Allen, guardian, against the Midway Oil & Gas Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Haskell B. Talley, for plaintiff in error.

E. J. Lambert, J. B. Tomlinson, Walter L. McVey, and *C. J. Sloop,* for defendant in error.

WILLIAMS, J. The facts in this case are substantially and practically the same as those in *Cedric Duff et al. v. Harwood Keaton et al., post,* 124 Pac. 291.

Under the authority of said cause, the judgment of the lower court is affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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DUFF *et al.* v. KEATON *et al.*

No. 2089. Opinion Filed May 14, 1912.

(124 Pac. 291.)

1. **GUARDIAN AND WARD—Oil and Gas Lease—Nature of Estate—"Sale of Realty."** A lease granting oil and gas mining privileges for a term of years is not a "sale of realty" as contemplated by section 5314, Comp. Laws 1909.

2. **PROPERTY—Guardian and Ward—Oil and Gas Lease—Nature of Property—Sale by Guardian—"Personalty."** A lease granting oil and gas mining privileges for a term of years is a "chattel real."

(a) A chattel real is "personalty."

(b) A lease for such purposes, made by the guardian of a minor, permission of the court having first been obtained thereto, and such lease having been approved and confirmed by the court, though without the preliminary notices essential for the order of sale and confirmation of the same in case of the sale of real estate of minors by guardians, is valid against a collateral attack.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Cedric Duff, a minor, by his mother, Evaline Duff, as next friend, and by the latter in her own right, against Harwood Keaton, guardian, and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

Eaton & Carter and *Scothorn, Caldwell & McRill,* for plaintiffs in error.

Geo. S. Ramsey and *C. L. Thomas,* for defendants in error.

J. B. Diggs, A. L. Beaty, John H. Kane, M. E. Michaelson, and *Henry McGraw, amici curiae.*

WILLIAMS, J. This proceeding in error is to review the judgment in an action brought by Cedric Duff, a minor, by his mother, Evaline Duff, as next friend, and the said Evaline Duff in her own right, as next of kin to the said Cedric Duff, against

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Harwood Keaton, as guardian of the said Cedric Duff's estate, and the Prairie Oil & Gas Company, a corporation, to enjoin a waste of said ward's estate, to have declared null and void and set aside a pretended oil and gas lease upon said ward's estate, and for an accounting and recovery for waste already committed. A demurrer was sustained to the plaintiffs' amended petition, and plaintiffs having elected to stand on same, a judgment dismissing the action and for costs was entered against them.

It is the contention of the plaintiffs in error that certain proceedings had in the county court of Okmulgee county, authorizing said oil and gas lease, are not merely irregular and erroneous, but absolutely void; that such invalidity is not made to appear by facts outside the record, but is shown and established upon the face of the record itself, being a sale of real estate by the guardian, in violation of the requirements of section 5314, Comp. Laws 1909; and that such sale can be approved by the county court only after certain preliminary requirements.

The petition for leave to lease the land of said ward for oil and gas mining purposes is, in part, as follows:

"Comes now Harwood Keaton and shows to the court: That he is the duly appointed, legally qualified, and acting guardian of the person and estate of Cedric Duff, a minor. That said minor is the owner of certain real estate located in Okmulgee county, Okla., and more particularly described as follows: * * * That said land was allotted to said minor by the Creek Nation, and Cedric Duff is duly enrolled upon the Creek freedmen roll. That said premises are situated in what is known as the oil and gas belt in the state of Oklahoma, and your petitioner believes that the same are valuable for oil and gas mining purposes. Your petitioner further shows to the court that neither he nor his said ward are able to develop said property for oil and gas because of lack of means necessary to drill and equip oil and gas wells: that wells have been drilled for oil and gas in the neighborhood of this land, and oil and gas have been discovered and are being produced in paying quantities, and unless your petitioner is authorized by this court to lease the lands of his ward to some person or company able to properly develop the premises for oil and gas and protect the interest of his ward, the estate will suffer waste and loss by drainage to wells which may be and are being drilled adjacent to the property herein described. Your petitioner

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further shows that, if oil and gas are found in paying quantities on the above-described land, it will greatly enhance the value of his ward's estate, and the money which may be derived from the production of oil and gas from said premises is necessary for the proper education, maintenance, and support of his said ward. Wherefore, petitioner prays the court to make and enter an order herein directing him, as the guardian of said minor, to enter into an oil and gas mining lease with some responsible person or company in order that said premises may be developed for oil and gas, and the estate of said Cedric Duff protected."

On the same day that said petition was filed in said county court, the following order was made:

"This cause coming on to be heard upon this 24th day of December, 1908, on the duly verified petition of Harwood Keaton, who is the guardian of the person and estate of Cedric Duff, a minor, praying for permission and an order of court permitting and directing him, the guardian, to execute an oil and gas mining lease upon the following described premises of his ward, to wit, * * * and it being shown to the court that such action will be to the best interest of said ward, and that it is necessary to execute an oil and gas mining lease to some person or company which is able to properly develop said premises in order that the interest of said minor may be protected, and it being fully shown to the court that neither the guardian nor his ward have means sufficient to develop said premises for oil and gas, it is by the court ordered that said Harwood Keaton, guardian of the person and estate of Cedric Duff, a minor, be and is hereby directed and authorized to execute an oil and gas mining lease to some company or person responsible and able to develop said premises for oil and gas."

It is insisted by plaintiffs in error that said order is void for the reason that no compliance was made with sections 5503, 5504, and 5505, Comp. Laws 1909, by making an order directing the next of kin of said minor, or persons interested in said estate, to appear before said court at any time or place in such order specified, to show cause why an order should not be granted for the making of such oil and gas lease upon said estate, and without personal service or service by publication, and without any attempt at personal service or service by publication, of notice upon said plaintiff, Evaline Duff, as the next of kin of said ward, Cedric Duff, or upon any person interested in said ward's estate,

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etc.; and further, for the reason that said order did not set forth and specify the terms upon which the said guardian should lease said premises for oil and gas mining purposes pursuant to sections 5316 and 5508, Comp. Laws 1909.

On December 24, 1908, the said guardian, pursuant to said order, but without any appraisement of said estate for oil and gas mining purposes ever having been made, pursuant to section 5318, Comp. Laws 1909, and without any notice of the time and place of a public sale of said oil and gas mining lease on said ward's estate, pursuant to the provisions of section 5320, Comp. Laws 1909, made the following report as to his action in the premises to said court, to wit:

"Comes now Harwood Keaton and respectfully shows to the court that he, as guardian of the person and estate of Cedric Duff, a minor, acting under the direction of this court in an order made and entered on the 24th day of December, 1908, directing him, as such guardian, to execute an oil and gas mining lease on the premises of his ward to some person or company responsible and able to properly develop said premises for oil and gas and protect the interest of his ward, has on this day entered into an oil and gas mining lease with the Prairie Oil & Gas Company, a Kansas corporation; said lease continuing from this date to a period ending December 1, 1926, and not extending beyond the minority of his ward. The conditions of said lease are that the lessee is to pay to the estate of the said minor a royalty of one-eighth of all oil produced and the sum of two hundred fifty ($250.00) dollars for each and every gas well drilled thereon, the product of which is marketed off the premises. The lessee pays, as a bonus for the execution of said lease, the sum of eighty ($80.00) dollars in cash, and if a well is not drilled within one year from the date of said lease the lease is to be null and void unless the lessee pays to the estate of said minor the sum of twenty-five cents per acre, semi-annually. Your petitioner further shows to the court that this is the best offer he has been able to secure for an oil and gas mining lease on these premises; that he has made diligent inquiry and knows that the Prairie Oil & Gas Company is financially able to develop said premises for oil and gas and is able to fully protect the interest of said minor in said premises, and believes it for the best interest of said minor that the court approve the lease executed by his guardian to the Prairie Oil & Gas Company, and prays the court that his action in so doing be in all things approved and confirmed by this court."

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It is contended by counsel for plaintiffs in error that sections 5323 and 5324, Comp. Laws 1909, require the setting of a day for hearing such report and notice, etc., and that such was not done in this case.

On said report the court rendered the following order:

"Now on this 24th day of December, 1908, this cause coming on to be heard upon the report of the guardian filed herein showing that in pursuance of an order heretofore made and entered in this cause, directing him, as such guardian, to execute an oil and gas mining lease on the premises of his ward, to wit, * * * and said report showing that the orders of this court have been complied with, the court upon investigation finds: First. That the premises above described are in the oil and gas belt of the state of Oklahoma, and should be developed for oil and gas. Second. That neither the guardian nor his ward have means sufficient to develop said premises for oil and gas. Third. That the estate would suffer waste and loss if said premises are not developed for oil and gas. Fourth. That the bonus paid by the Prairie Oil & Gas Company is a reasonable bonus. Fifth. That the royalty agreed to be paid by said lessee is the royalty usually paid by responsible oil and gas operators in that territory. Sixth. That it is to the best interest of said minor that said lease be approved and confirmed by this court. The court further finds that the Prairie Oil & Gas Company, a Kansas corporation, the lessee, is responsible and financially able to develop said premises for oil and gas and is able to properly protect the interest of said minor in said premises. It is therefore by the court considered, ordered, and adjudged that the lease this day executed by Harwood Keaton, as guardian of the person and estate of Cedric Duff, a minor, to the Prairie Oil & Gas Company, a Kansas corporation, covering the above-described premises, be and the same is hereby approved and confirmed by this court."

Plaintiffs in error further contend that said order of confirmation is void for not complying with section 5323, Comp. Laws 1909, relative to confirming the sale of lands of minors. It is insisted by the plaintiffs in error that:

"An oil and gas lease which demises, grants, and lets, for a term of years, all of the oil deposits and natural gas in and under a particular tract of land, conveys a portion of the *corpus* of the estate, and is a sale of real estate within the meaning of the Probate Code of Oklahoma."

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1. Is such a lease a sale as contemplated by section 5314, Comp. Laws 1909? When sections 1187, 1194, and 1195, Comp. Laws 1909, are considered together, it is obvious that a lease for a period of over one year, within the terms of said statutes, is not a conveyance of real estate. A lease for one year or for six months is an instrument relating to real property; section 95, *supra,* indicating that the Legislature did not understand a lease as conveying real estate or an interest therein, for that section expressly declares that no deed, mortgage, contract, bond, lease, or other instrument relating to real estate, other than a lease for a period not exceeding one year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as therein provided.

Under the theory of the plaintiffs in error, the guardian cannot lease the lands of his ward for any term of years in excess of one year for agricultural, grazing, or commercial purposes, unless the guardian files a petition in court alleging that the income of the ward is insufficient to maintain or educate said ward, and such lease must be made or sold for the purpose of deriving funds with which to educate or maintain the ward, or alleging that such lease for any term over one year, for agricultural, grazing, or any other commercial purpose should be made for the benefit of the estate, for reinvestment, etc.

The statutes of this state are entirely lacking as to any specific provision for the procedure to be followed by the guardian in leasing the lands of his ward for agricultural or grazing or commercial purposes or for exploring for oil or gas.

By sections 12 and 13 of article 7 of the Constitution, jurisdiction of all probate matters is conferred upon the county court.

By section 5478, Comp. Laws 1909, it is provided that "every guardian appointed shall have the custody and care of the education of the minor; and the care and management of his estate, until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged." In the following section the guardian is required, before his appointment becomes effective, to give bond to the minor conditioned that he will faithfully execute the duties of his trust according to law; it being

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specially provided that the following conditions shall constitute a part of every such bond without being expressed therein: First. To make an inventory of all the estate, real and personal, of his ward that comes to his possession or knowledge, and to return the same within such time as the judge may order. Second. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward. Third. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs; and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto.

Section 5491, Comp. Laws 1909, is as follows:

"Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward, and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate upon obtaining an order of the probate court therefor, as provided, and must apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any."

On account of section 5513, Comp. Laws 1909, which provides:

"The county court, on the application of a guardian or any person interested in the estate of any ward, after such notice to persons interested therein as the judge shall direct, may authorize and require the guardian to invest the proceeds of sales and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and *the probate court may make such other orders and give such directions as are needful for the management, investment and dis-*

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position of the estate and effects, as circumstances require" (italics ours)

—a guardian has no authority to lease the lands of his ward, or enter into a license or contract covering the same, for oil and gas mining purposes, without the direction and approval of the probate court. For said section stipulates that the probate court may "make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require." The rule obtaining at common law for the guardian to lease the lands of his ward without the approval of the court is thereby changed.

We reach the conclusion that a lease for oil and gas or mining purposes is not a "conveyance of real estate" within the purview of section 5314, *supra,* and in this we are supported by many authorities dealing with and construing statutes of similar import.

In *Tone v. Brace,* 11 Paige (N. Y.) 566, in holding that a lease for a term of years was not within the statute excluding implied covenants in conveyances of land, the chancellor said:

"Such a lease is not, in common parlance, called a conveyance of lands, tenements, or hereditaments, though an instrument by which the lessee might afterwards transfer his interest in the leasehold premises to another might very properly be denominated a conveyance of his chattel interest as lessee."

In *Perkins v. Morse,* 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780, the court, reaching the conclusion that a lease for years by a married woman was not a conveyance of the land, said:

"A lease may be, in a sense, a conveyance; but such is not the commonly accepted nor the accurate meaning of the term. When we say premises are 'leased,' we generally mean that the use of them is transferred, and by the term 'conveyed' that the title is deeded."

In *State v. Evans,* 99 Minn. 220, 108 N. W. 958, 9 Am. Cas. 520, upholding an act of the Legislature providing for the issuance of mineral leases on school lands, without offering them at public sale, in the face of a constitutional provision that no such lands should be sold otherwise than at public sale, the court said:

"The term 'sale,' as ordinarily used, and as it is used in the Constitution in reference to the disposition of school lands, means

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the transfer of the absolute or general property in the thing sold. In determining whether a mineral lease of the kind here in question is a sale, neither the name nor form given to it by the statute is controlling. The legal effect of the transaction determines its classification, not its form. * * * The conclusion to be drawn from the English cases, as clearly and correctly stated by the learned trial judge, is this: 'That from the very beginning the rights of the man who owned the land, and of the man who took the minerals from it, were worked out through the law of tenancy, without the aid of the law of sales. That it was never a conception of the law that the man who took away the mineral got his title through a sale by the owner of the land; but the theory was that the mineral was the product of the use for which rent was paid, and that the tenant got his title to his mineral by an appropriate use of the demised premises. That it never was a circumstance of significance that the use of the demised premises, in accordance with the intent of the parties, and in accordance with the nature of the use to which they could be put, resulted in the gradual consumption or even exhaustion of the portion of the land of chief worth.' A consideration of the cases in this country leads to a like conclusion."

2. Is a lease for oil and gas mining purposes for a term of years realty or personalty? Under our statute, "estates for years are chattels real." Section 7216, Comp. Laws 1909.

In 1 Woerner's American Law of Administration, at page 231, it is said:

"Leasehold estates and estates for years are treated at common law as personal property, and the widow of a lessee dying is not entitled to dower therein, although it be for a period of a thousand years, or renewable forever, or although the lease contain a covenant to convey the estate in fee on the demand of the lessee."

In *Despard et al. v. Churchill et al.*, 53 N. Y. 192, it is said:

"The property in this state affected by this will is leasehold estates, held by leases for a short term of years. That is, at common law, personal property. 3 Kent, 401; 2 Kent, 342; *Merry v. Hallet*, 2 Cow. 497; *Brewster v. Hill*, 1 N. H. 350."

In *Cunningham v. Baxley*, 96 Ind. 367, where a lease for life was under consideration, it was said:

"Such a lease is not real estate; it is a chattel interest; it does not descend to the heirs, but goes to the executor or administrator; and he is the party to maintain a suit for possession against

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one who has wrongfully taken possession of the leased premises. * * *"

In *McCormick v. Stephcny*, 57 N. J. Eq. 264, 41 Atl. 843, it is said that the unexpired term of a lease "is an asset in the hands of the executor or administrator. * * * By the express terms of the will all real and personal estate are given to the complainant," lessee's widow. "But, however absolute may be the gift to her, if the thing be an asset to be administered, the executor primarily takes it, and all rights touching must, during the period of administration, be asserted by the executor as such, or it must appear that the executor assents to the possession of the legatee."

In *Thornton v. Mehring*, 117 Ill. 55, 25 N. E. 958, a lease for 89 years being under consideration, the court said:

"There would seem to be no doubt that the lease in this case was personalty, and the legal title and power of disposal passed to the administratrix on the grant of letters of administration."

In *Faler v. McRae*, 56 Miss. 227, it was held that a lease of land for 99 years is a chattel real, and upon the death of the lessee descends to the administrator of his estate, and that so long as there is a valid debt against the estate the heirs and distributees cannot acquire any title as against the creditor, and any conveyance thereof by them is ineffectual as against such creditor. To the same effect, see *Webster v. Parker*, 42 Miss. 465; *Becker v. Walworth*, 45 Ohio St. 169, 12 N. E. 1; *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

In *Gutzweiler's Adm'r v. Lackmann*, 39 Mo. 97, it is said:

"Being a lease for ten years, we think it should be treated as a mere chattel interest, which, of course, goes to the administrator upon the death of his intestate, and not to the heirs, and therefore the suit was properly revived in the name of the personal representative."

See, also, *Dillingham v. Jenkins*, 15 Miss. 479; 3 Kent's Commentaries, p. 401; *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56; *Goodwin v. Goodwin*, 33 Conn. 317; *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725; *Holzman v. Wager*, 114 Md. 322, 79 Atl. 205, Ann. Cas. 1912A, 619.

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In *Kolachny v. Galbreath et al.*, 26 Okla. 772, 110 Pac. 902, it was held that:

"Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing that can be the subject of an ejectment or other real action."

In *Frank Oil Co. v. Belleview Gas & Oil Co.*, 29 Okla. 719, 119 Pac. 260, this court followed the rule announced in *Kolachny v. Galbreath et al., supra,* and said:

"This lease, under these decisions, does not have the effect of placing the title of the oil and gas that is under the surface of the land in controversy in the lessee, but to grant to the lessee the privilege of exploring for the oil and gas."

The rule seems to be settled in this jurisdiction that the grant of an exclusive privilege to go upon land for the purpose of exploring for oil or gas, the grantor to receive part of the oil or gas mined, does not vest in the grantee any estate in the land or oil or gas, but is merely a license or grant; such a lease creating an incorporeal hereditament only, and the lessee having no right or title to the oil or gas lying under the surface of the land. This, under our statute, is simply a chattel real.

In *Wagner v. Mallory*, 169 N. Y. 501, 62 N. E. 584, a deed was under consideration, wherein "all the lands and premises" owned by the grantor, located in a certain place and specifically described, were conveyed to a certain grantee. There was an oil and gas lease outstanding in favor of a certain lessee, made by the grantor. The grantee in the deed afterwards insisted that said conveyance vested in him also the lease interest. The court held that the interest under the lease was not transferred, saying:

"In other words, the intent was to convey an interest in real estate, and not in personal property. We think the provision does not cover the interest in the lease."

This case specifically holds that an oil and gas lease is personal property.

We conclude that an oil and gas lease is neither a conveyance, within the purview of section 5314, *supra,* nor a sale of the

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minor's real estate within the terms of said section; such lease being personalty.

But it is insisted that these conclusions are contrary to section 5530, Comp. Laws 1909, which authorizes guardians of infants and insane persons to lease and grant oil and gas mining rights in consideration of a royalty or part or portion of the production thereof, and under the same procedure in the county court, as now provided by law, where such consideration is money. But we have heretofore reached the conclusion that the rule existing at common law, by which the guardian was authorized to lease the lands of the ward for a number of years without the approval of the probate court, has been changed by section 5513, *supra,* and that by said section said leases in order to be valid must be first approved by the probate court; it being specially provided by said section that the probate court may make such other orders and give such directions as are needful for the management, investment, and disposition of the estate and effects, as circumstances require.

Having also reached the conclusion that such a lease was personalty and not realty, it is under the procedure by virtue of said section 5513 that oil and gas leases were authorized to be approved by the probate court, and section 5530 obviously referred to such procedure by virtue of said section. This construction harmonizes all the provisions of said statutes.

This conclusion does not militate against the rule announced in *Eldred et al. v. Okmulgee Loan & Trust Co.,* 22 Okla. 742, 98 Pac. 929. There it was held that a lease was an alienation within the terms of an act of Congress approved April 21, 1904 (33 Stat. 204, c. 1402), which reads:

'And all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed."

Wherein this court said:

"Hence we conclude that a lease conveys a leasehold estate; is an 'alienation by deed'; is an alienation within the intent and meaning of the act of April 21, 1904, *supra,* upon which species of alienation restrictions by that act were removed."

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But we have heretofore reached the conclusion that leasehold estates and "estates for a term of years" were chattels real, and that such were included within that class of property known as personal property, and the procedure followed in this record harmonizes with that in force in the state for the sale of personalty by order and approval of the probate court.

In the argument of this case before this court the statement is made without denial that hundreds of acres of land belonging to minors in Eastern Oklahoma have been explored under contracts similar to this, approved by the county courts under a similar procedure; that the county courts of said section of the state where oil and gas have been found have uniformly construed section 5314, Comp. Laws 1909, as not applying to an oil and gas lease; that the district courts, where the question has been raised, have also put a like construction thereon; and that the Secretary of the Interior has uniformly recognized as legal and valid leases of minors approved under the procedure in this case in the conduct of his office relative to the guardianship of the federal government over the Indians.

No charge of fraud is made in this case against the defendant in error; no charge of actual fraud is made against the guardian. The only allegation kindred to such a charge is that the guardian's conduct in making the lease was a fraud because it has resulted in the wasting of the oil and gas in the lands of the defendant, but just how the exploration and development of property for oil and gas and the accounting for the same by legitimate production can be waste is not pointed out.

Wherever there is fraud participated in by the lessee, as a rule the conveyance may and ought to be set aside. That is not the question here involved. The rule here sought to be invoked would strike down every lease, it matters not how much investment had been honestly made under it, and probably bring about chaotic conditions in the development of one of the great industries of this state.

These investments have been made under constructions placed by the county judges and the district judges on these statutes. *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935. A reasonable

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consideration of these statutes sustains the conclusion reached by such courts.

It follows that the judgment of the lower court must be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

ATCHISON, T. & S. F. RY. CO. v. STATE *et al.*

No. 2126. Opinion Filed May 14, 1912.

(124 Pac. 57.)

CARRIERS—Regulation—Orders of Corporation Commission—Construction. Rule 6 of Order 168, imposed by the Corporation Commission, applies only to intrastate shipments.

(a) A fine on account of interstate shipments cannot be imposed under said rule upon a carrier.

(Syllabus by the Court.)

Appeal from Order of Corporation Commission.

Appeal by the Atchison, Topeka & Santa Fe Railway Company from an order of the Corporation Commission in proceedings by Thatcher & Sons. Reversed and remanded, with instructions.

Cottingham & Bledsoe, for appellant.

Charles West, Atty. Gen., and *C. J. Davenport,* Asst. Atty. Gen., for appellees.

WILLIAMS, J. This is an appeal from the order of the Corporation Commission, imposing a fine of $100 upon the appellant for failure to move an interstate shipment, as required by rule 6 of order No. 168 of said Commission.

The Attorney General has filed in this case the same suggestion that he did in the case of *A., T. & S. F. Ry. Co. v. State, post,* 124 Pac. 56, and confesses that the order entered by the Commis-

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sion is erroneous, and that rule 6 of order No. 168, under a reasonable construction, does not apply to an interstate shipment.

It follows that the order of the Commission is reversed, and this cause is remanded, with instructions to set aside the order and dismiss the proceeding.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

COPELAND v. OLSMITH, *Mayor, et al.*

No. 2685. Opinion Filed May 14, 1912.

(124 Pac. 33.)

INJUNCTION—Subjects of Relief—Holding Election. A court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one.

(Syllabus by the Court.)

Error from Superior Court, Logan County;
S. S. Lawrence, Judge.

Action by A. G. Copeland against Frank Olsmith, Mayor of the City of Guthrie, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Chappell, J. M. Sandlin, and *T. C. Whitely,* for plaintiff in error.

James Hepburn, for defendants in error.

WILLIAMS, J. On May 18, 1911, plaintiff in error instituted an action in the superior court of Logan county, Okla., against the defendants, Frank Olsmith, mayor of the city of Guthrie, E. H. Winslow, city clerk, and G. W. Bruce *et al.,* members of the city council, praying for an injunction to issue against them, restraining them, and each of them, from carrying into effect the provisions of the proposed charter of the city of Guthrie, which, in effect, would prevent the holding of an election under said charter for the election of certain officers therein named.

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In *City Council of the City of McAlester et al. v. Tal Milwee et al.*, 31 Okla. 620, 122 Pac. 173, it is said:

"This was a suit in equity, commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, for the purpose of enjoining the proper officer or officers of the city of McAlester from calling an election for the purpose of submitting to the electors of said city the question whether the mayor of said city should be recalled. * * * Courts of equity are only conversant with matters of property and the maintenance of civil rights, and will not interfere to enforce or protect purely political rights. This doctrine has been universally applied in other jurisdictions where equity has been invoked to interfere in matters preceding an election. In *Fletcher v. Tuttle*, 151 Ill. 41 [37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220], the Supreme Court of that state, after a review of the authorities, reaffirmed the doctrine, previously adopted, that chancery has no jurisdiction to protect purely political rights, such as those in respect to public elections, and held specifically that an injunction could not be granted to prevent the giving of election notices, or the certifying of nominees for districts created by an apportionment act claimed to be unconstitutional, because such rights were purely political and enforceable only at law. It had been previously held in that state that a court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one. *People ex rel. Fitnam v. Galesburg*, 48 Ill. 485; *Walton v. Develing et al.*, 61 Ill. 201; *Darst et al. v. People*, 62 Ill. 306; *Harris et al. v. Schryock et al.*, 82 Ill. 119. This question is fully annotated in a note to *Shoemaker v. City of Des Moines et al.*, 129 Iowa, 224 [105 N. W. 520], 3 L. R. A. (N. S.) 382. These cases seem to sustain the conclusion here reached."

In *Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 25 U. S. App. 383, 30 L. R. A. 90, in an opinion by Chief Justice Fuller, sitting as a member of the United States Court of Appeals for the Fourth Circuit, it is said:

"The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482 [31 L. Ed. 402]; *Luther v. Borden*, 7 How. 1 [12 L. Ed. 581]; *Mississippi v. Johnson*, 4 Wall. 475 [18 L. Ed. 437]; *Georgia v. Stanton*, 6

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Wall. 50 [18 L. Ed. 721]; *Holmes v. Oldham,* 1 Hughes, 76, Fed. Cas. No. 6,643. 'Neither the Legislature nor the executive department,' said Chief Justice Chase, in *Mississippi v. Johnson,* 'can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.' 'The office and jurisdiction of a court of equity,' said Mr. Justice Gray, *In re Sawyer,* 'unless enlarged by express statute, are limited to the protection of rights of property.' To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government, or of the courts of common law."

See, also, the authorities cited in this case.

Fletcher v. Tuttle, cited with approval in *City Council of the City of McAlester et al. v. Milwee et al., supra,* is quoted from with approval by Chief Justice Fuller in this case.

The injunction sought in this case, as appears on the face of the bill, was to prevent the defendants in error from holding an election pursuant to the terms of the charter of said city, at which certain officers were to be elected. The injunction having been properly denied, and the bill dismissed, the judgment of the lower court will be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

HARSHA v. RICHARDSON *et al.*

No. 2697. Opinion Filed May 14, 1912.

(124 Pac. 34.)

APPEAL AND ERROR—Remand—Procedure—Second Appeal. Where a cause is reversed and remanded by the Supreme Court with directions to proceed in accordance with the decision of the appellate court, and the court below proceeds in substantial conformity with such direction, its action will not be considered on a second appeal.

(Syllabus by the Court.)

Error from District Court, Muskogee County; Charles Bagg, Judge.

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Action between Laura E. Harsha, Trustee for the Women's Christian Temperance Union of Muskogee, Okla., and H. E. Richardson and others, Trustees for the Members of the Cumberland Presbyterian Church of Muskogee, Ind. T. From the judgment, Laura E. Harsha brings error. Dismissed.

C. A. Cook and *N. B. Maxey,* for plaintiff in error.

Frank Scruggs and *Preston C. West,* for defendants in error.

KANE, J. This cause comes on to be heard upon the motion to dismiss the petition in error for the reason that it appears from an inspection of the case-made that every question, both of law and of fact, involved herein is *res judicata* by a former decision of this court in the same case reported in *Richardson v. Harsha,* 22 Okla. 405, 98 Pac. 897. On the former hearing in this court the judgment of the court below was reversed and the cause remanded, with directions to render judgment in accordance with the views of the Supreme Court. After the cause was remanded no further proceedings of any kind were had except to enter judgment in accordance with the opinion and mandate of the court. To reverse this action the present proceeding in error was commenced.

The cause was originally instituted in the United States Court for the Western District of Indian Territory, and was decided by that court prior to the advent of statehood and was pending in the United States Court of Appeals for Indian Territory upon the admission of the state. Thus the law existing in Indian Territory prior to statehood and the procedure thereby provided apply to this cause. In that jurisdiction it was well settled that the Supreme Court had no power after the lapse of the term to reverse or modify its judgment given at a previous term; that, where a cause had been decided and remanded to the lower court all questions determined when the cause was before the appellate court are *res judicata* and must be treated as settled; that, where the Supreme Court determines a matter on appeal and remands the case for judgment, the matter so determined cannot be retried in the lower court, nor considered on a

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second appeal, but can only be considered on motion for a rehearing. *Fortenberry v. Frazier et al.*, 5 Ark. 200, 39 Am. Dec. 373; *Real Estate Bank v. Rawdon*, 5 Ark. 558; *Pulaski County v. Lincoln*, 13 Ark. 103; *Rawdon v. Rapley*, 14 Ark. 203, 58 Am. Dec. 370; *Rector v. Danley*, 14 Ark. 304; *Scott v. Eaton*, 26 Ark. 17; *Perry v. L. R. & F. S. Ry. Co.*, 44 Ark. 386; *Vogel v. Little Rock*, 55 Ark. 609, 19 S. W. 13; *Dyer v. Ambleton*, 56 Ark. 170, 19 S. W. 574. To the same effect are *Oklahoma City Gas, Elec. & Power Co. v. Baumhoff*, 21 Okla. 503, 96 Pac. 758; *Chicago etc., Ry. Co. v. Broc*, 23 Okla. 396, 100 Pac. 523; *Harding v. Gillett et al.*, 25 Okla. 199, 107 Pac. 665; *State Bank of Waterloo, Ill., v. City Nat. Bank of Kansas City, Mo.*, 26 Okla. 801, 110 Pac. 910; *Harper v. Kelley*, 29 Okla. 809, 120 Pac. 293.

All of the foregoing cases sustain the doctrine that where a cause is reversed and remanded by the Supreme Court with directions to proceed in accordance with the decision of the appellate court, and the court below proceeds in substantial conformity with such direction, its action will not be considered on a second appeal.

The motion to dismiss is sustained.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

KERR, *County Clerk*, v. STATE *ex rel.* WIMBISH, *County Attorney*.

No. 2759. Opinion Filed May 14, 1912.

(124 Pac. 284.)

1. **COUNTIES—Indebtedness—Limitations.** The limitation imposed upon county indebtedness by section 1 of chapter 16, Sess. Laws 1895, Ter. of Oklahoma (section 1683, Comp. Laws 1909), includes debts and liabilities incurred and fixed by operation of law as well as those arising from express contracts.

2. **SAME.** Section 26 of article 10, p. 150, Williams' Ann. Const. Okla., fixes a limitation upon the authority of the Legislature and other agencies of the state to allow the counties, cities, and other subdivisions of the state to become indebted and is not a

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limitation upon the authority of the Legislature to fix a limit within the bounds therein determined, hence section 1 of chapter 16, Sess. Laws 1895 (section 1683, Comp. Laws 1909), is not repugnant thereto and was brought over and became a valid statute of this state under and by virtue of the terms of the Enabling Act and the Schedule to the Constitution.

3. **MANDAMUS—Proceedings—Accrual of Cause of Action.** The issue to be tried and determined in mandamus is that raised by the writ and answer, and the nonexistence of a cause of action when a suit is brought is a fatal defect which cannot be cured by the accrual of a cause while the suit is pending.

(Syllabus by the Court.)

Error from District Court, Pontotoc County; Tom D. McKeown, Judge.

Action by the State on the relation of Robert Wimbish, County Attorney of Pontotoc County, for mandamus to W. S. Kerr, County Clerk of Pontotoc County. Judgment for plaintiff, and defendant brings error. Reversed and remanded with directions to dismiss.

Currie & Duncan and *J. F. McKeel,* for plaintiff in error.

Chas. West, Atty. Gen., *W. C. Reeves,* Asst. Atty. Gen., and *Robert Wimbish,* Co. Atty., for defendant in error.

DUNN, J. This case presents error from the district court of Pontotoc county and was an action of mandamus in that court brought by the state of Oklahoma on the relation of the county attorney of that county against the county clerk thereof, for the purpose of securing an order requiring him to sign, seal, and deliver certain warrants for claims which had been allowed by the board of county commissioners to the extent of 100 per cent. of the levies made for the fiscal year ending June 30, 1911, and for such other sums as may have been or may be added to any of the county funds against which warrants might properly be drawn. The demand was made on June 5, 1911, and, under the agreed statement of facts, it is admitted that warrants had then been issued to the amount of 80 per cent. of the revenue provided for by the county levies and to 100 per cent. of the income that had been added to the funds, so that at the time the warrants in issue

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were drawn by the board of county commissioners, and the demand was made upon respondent to sign, seal, and deliver the same, warrants to the extent of 80 per cent. of the levies had already been issued, and the county treasury was without funds or moneys to meet them. It will thus be seen that, in accord with the statement of counsel for plaintiff in error, the pleadings and agreed statement of facts submit to the court the single issue, namely, Is the limitation of 80 per cent. as fixed by section 1 of chapter 16, Sess. Laws 1895 (section 1683, Comp. Laws 1909), on the issuance of warrants on the various funds a valid and lawful limitation, and was the statute brought over and put in force by virtue of section 2 of the Schedule to the Constitution or was it in conflict with section 26 of article 10 of the Constitution?

The statute in question reads as follows:

"It shall be unlawful for the board of county commissioners to issue any certificate of indebtedness, in any form, in payment of, or representing or acknowledging any account, claim or indebtedness against the county, or to make any contracts for, or incur any indebtedness against the county in excess of eighty per cent. of the tax levied for county expenses during the current year, nor shall any expenditure be made or indebtedness be contracted, to be paid out of any of the funds of said county, in excess of eighty per cent. of the amount levied for said fund. If any such certificate of indebtedness be issued, or any indebtedness be incurred or contracted in excess of eighty per cent. of the tax levied for that purpose for that year, such certificate, contract or debt, shall not be a charge against the county, but may be collected, by civil action, from the board of county commissioners, or either of them, or their bondsmen. All warrants upon the county treasurer shall be issued upon the order of the board of county commissioners, signed by the chairman thereof and attested by the signature of the county clerk, with the county seal attached, and shall designate the fund upon which they are drawn, and each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn and the amount of such funds, at the time expended, and any warrant drawn on such fund, when there are no funds in the treasury for the payment of the same, and eighty per cent. of the amount levied for such fund for the year is exhausted, shall be void as against the county, but may be collected by civil action from the board of

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county commissioners and the county clerk, or either of them, or their bondsmen."

It is to be noted that the last sentence of the act renders any warrant drawn on any fund when there are no funds in the treasury for the payment of the same, and 80 per cent. of the amount levied for such fund is exhausted, not only void as against the county, but provides that it may be collected by civil action from the board of county commissioners and the county clerk or either of them or their bondsmen. Under these circumstances, the rule laid down by this court in the case of *Shannon v. State ex rel., post,* 125 Pac. 1106, obtains, and mandamus will not lie to compel the county clerk to comply with the demand made. The agreed statement of facts presents an issue which brings this case squarely within this limitation. This act was construed by the Supreme Court of the territory of Oklahoma in the case of *Huddleston v. Board of Com'rs of Noble Co.,* 8 Okla. 614, 58 Pac. 749. In that case it was held by the court:

"Under the provisions of section 1, c. 16, Sess. Laws 1895, the board of county commissioners have no power to allow a claim and issue a warrant therefor after eighty per cent. of the tax levy for county expenses during the current year has been exhausted, and hence, where the plaintiff's claim for juror's services was filed and presented to the board of county commissioners for allowance after eighty per cent. of the tax levied for such purposes had been exhausted, a mandamus will not lie to compel the board of county commissioners to allow plaintiff's claim and issue a warrant therefor."

This case is relied on by counsel for plaintiff in error, but it is neither distinguished nor controverted in any particular by either of the counsel for the state.

Nor in our judgment is it of any consequence that the indebtedness upon which this statute operates is fixed by law or is incurred or created by contracts made by the board of county commissioners. Such has been the holding of a great majority of the courts in the construction of similar provisions of other statutes and Constitutions. *Lake County v. Rollins,* 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *People ex rel. Seeley v. May,* 9 Colo. 404, 12 Pac. 838; *Barnard & Co. v. Knox County,* 105

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Mo. 382, 16 S. W. 917, 13 L. R. A. 244; *Hagan v. Com'rs Court et al.*, 160 Ala. 544, 49 South. 417; *Fiscal Court v. Commonwealth* (Ky) 117 S. W. 301; *Hebard et al. v. Ashland County et al.*, 55 Wis. 145, 12 N. W. 437; *Anderson et al. v. Orient Fire Ins. Co. et al.*, 88 Iowa, 579, 55 N. W. 348; *D County v. Gillett*, 9 Okla. 593, 60 Pac. 277.

The foregoing, however, may be of no consequence, for if the act is found to be repugnant to section 26 of article 10, p. 150, Williams' Ann. Const. Okla., it was not brought over and of course would not be effectual for any purpose. The pertinent portion of the section of the Constitution referred to reads as follows:

"No county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted in any manner, for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election to be held for that purpose."

It is difficult to make clearer the force and meaning of the language used by any degree of refinement or discussion. It is the contention of counsel for relator, however, that this portion of this section of the Constitution is a grant of power to the municipal subdivisions of the state to become indebted to the amount of the income and revenue provided for the year, and, that being a grant of power, the act of the territorial Legislature under consideration, limiting as it does the amount of indebtedness which could lawfully be incurred, must fall. We cannot so read this language.

Discussing the proper rules for construction of written instruments, and especially Constitutions, Mr. Justice Lamar of the Supreme Court of the United States in the case of *Lake County v. Rollins, supra,* says:

"To get at the thought or meaning expressed in a statute, a contract, or a Constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must

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be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. *Newell v. People,* 7 N. Y. 9, 97; *Hills v. Chicago,* 60 Ill. 86; *Denn v. Reid,* 10 Pet. 524 [9 L. Ed. 519]; *Leonard v. Wiseman,* 31 Md. 201, 204; *People v. Potter,* 47 N. Y. 375; Cooley, Const. Lim. 57; Story on Const. sec. 400; *Beardstown v. Virginia,* 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States v. Fisher,* 2 Cranch, 358, 399 [2 L. Ed. 304]; *Doggett v. Florida Railroad,* 99 U. S. 72 [25 L. Ed. 301]. There is even stronger reason for adhering to this rule in the case of a Constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while Constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."

To our minds the simplest and most obvious interpretation of this section of the Constitution is to say that it is here intended to place a limitation upon the authority of the Legislature and other agencies of the state of allowing any of the subdivisions mentioned to create, assume, or incur in any manner or for any purpose any indebtedness in excess of the limitation therein fixed. There is no ambiguity in the section and no language susceptible of the construction that the people of the state, acting primarily or through the Legislature, are restricted in the exercise of the power to limit the amount of indebtedness which may be lawfully assumed in any year, and, this being true, the act in question in no wise conflicts with this constitutional provision, and hence was brought over by the Enabling Act and the Schedule to the Constitution and was, at the time the right of action accrued in this cause, a subsisting valid statute of the state.

The issue in this case arose at the time the demand was made and performance refused. If plaintiff had no cause of action,

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then, by reason of the failure of defendant to perform a plain duty, he could not acquire one by virtue of any act which might become effective thereafter. Our statute on mandamus (section 6232, Comp. Laws 1909) provides:

"No other pleading or written allegation is allowed than the writ and answer; these are the pleadings in the case, and have the same effect, and are to be construed and may be amended in the same manner, as pleadings in a civil action; and the issues thereby joined must be tried, and the further proceedings thereon had, in the same manner as in a civil action."

See *Beadles v. Fry et al.*, 15 Okla. 428, 82 Pac. 1041, 2 L. R. A. (N. S.) 855.

The rule generally applicable is stated in the case of *American Bonding & Trust Co. et al. v. Gibson County*, 145 Fed. 871, 76 C. C. A. 155, 7 Ann. Cas. 522, as follows:

"The nonexistence of a cause of action when suit is brought is a fatal defect which cannot be cured by the accrual of a cause while the suit is pending."

The issue joined by the writ and answer, and in no wise changed by the agreed statement, was whether defendant on June 5, 1911, was required by law to sign, seal, and deliver the warrants in question; finding adversely to the contention, it necessarily follows that the judgment of the trial court must be reversed and the cause remanded with instructions to dismiss the same.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

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ADLER v. JENKINS.

No. 2898. Opinion Filed May 14, 1912.

(124 Pac. 29.)

1. **MUNICIPAL CORPORATIONS—Charter—Validity.** Same as paragraph 1 of syllabus in **Mitchell v. Carter,** 31 Okla. 592, 122 Pac. 691.

2. **MANDAMUS—Proceedings—Scope of Relief.** Same as paragraph 1a of syllabus in **Mitchell v. Carter,** 31 Okla. 592, 122 Pac. 691.

3. **MUNICIPAL CORPORATIONS — Charter — Construction.** The charter adopted by virtue of the powers of article 18 of the Constitution of this state, having authorized the mayor to appoint a city treasurer, subject to confirmation by the majority vote of the commissioners in open session, and further providing that the commissioner elected as the head of each department of such charter government should, within fifteen days after his qualification, submit to the board of commissioners nominations for each of the offices under his department, **held,** that it was the intention of such charter to abolish the office of city treasurer under the old municipal charter, and to re-create the office under the new charter as an appointive office.

(Syllabus by the Court.)

Hayes and Kane, JJ., dissenting.

Error from District Court, Logan County;
A. H. Huston, Judge.

Action by Felix Adler for mandamus to Tom Jenkins. Judgment for defendant, and plaintiff brings error. Affirmed.

James Hepburn, W. H. Chappell, and *Devereux & Hildreth,* for plaintiff in error.

Burford & Burford, for defendant in error.

WILLIAMS, J. Plaintiff in error seeks in this proceeding to have determined: (1) The legality of the election for the adoption of the charter of the city of Guthrie; (2) the validity of the election held by virtue of the terms of said charter for the election of municipal officers; and (3) that the mayor of said municipality under the charter form of government has no authority

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to appoint a successor to the plaintiff in error until after the expiration of the term of office to which he had been elected, and for that reason there was no vacancy in the office of city treasurer at the time the defendant in error was appointed thereto.

The first two questions have been determined adversely to the contention of the plaintiff in error, in *Mitchell v. Carter,* 31 Okla. 592, 122 Pac. 691.

As to the third question, in *Lackey v. State,* 29 Okla. 255, 116 Pac. 913, it was held that:

"Wherever a freeholders' charter has been adopted under the provisions of the Constitution, and conflicts with any law of the state relating to municipal matters of cities of the first class, the provisions of such charter shall prevail."

In *Mitchell v. Carter, supra,* following *Lackey v. State, supra,* this court said that:

"Whenever any matter fell 'within the domain of municipal government' or related solely to municipal affairs, such provision of a municipal charter, adopted pursuant to the provisions of article 18 of the Constitution, superseded the general state laws."

The charter of the city of Guthrie, in defining the powers and duties of the mayor, provides:

"He is hereby authorized and empowered to appoint the following officers and appointees: City attorney, city treasurer, city assessor, city clerk, and such other appointees as the board of commissioners may deem necessary."

Section 5 of said charter provides:

"Appointment of all officers herein provided for to be made by the mayor and commissioners shall be subject to confirmation by a majority vote of the board of commissioners in open session."

Section 10 of article 2 of the charter provides:

"The commissioner elected as the head of each of said departments shall, within fifteen days after his qualification, submit to the board of commissioners, nominations for each of the offices under his department, and should the board refuse to confirm such nomination by a majority vote, then other names shall be submitted until a selection has been determined and an appointment confirmed."

Section 3 of article 18 of the Constitution provides that:

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"Upon such approval it (the charter) shall become the organic law of such city and supersede any existing charter and all amendments thereof and all ordinances inconsistent with it."

Section 645, Comp. Laws 1909, provides that upon the election to determine whether a city shall become a city of the first class, that also at the same time a city treasurer shall be elected who shall hold office until the first Tuesday in April, 1909, and until his successor is elected. By general statute of the state thereafter the term of such office is for two years.

When all the foregoing charter provisions are considered together, it is obvious that it was the intention of the electors of the city of Guthrie, in adopting the charter form of government, to completely supersede the former form of city government with all its officers, and to substitute a new form of government therefor in which the power is vested in the commissioners, and that all of the officers under the old charter were thereby legislated out of office.

The superseding of the old charter by the special charter, framed pursuant to article 18 of the Constitution, had the effect of abolishing the offices under the old charter. It is well settled that the repeal of a charter destroys all offices under it and puts an end to the functions of the incumbents. *Crook v. People,* 106 Ill. 237; *People v. Brown,* 83 Ill. 95; *Boyd v. Chambers,* 78 Ky. 140; *Watervliet v. Colonie,* 27 App. Div. 394, 50 N. Y. Supp. 487.

It follows that the judgment of the lower court must be affirmed.

TURNER, C. J., and DUNN, J., concur; HAYES and KANE, JJ., dissenting.

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RICHARDSON v. THOMPSON.

No. 3166. Opinion Filed May 14, 1912.

(124 Pac. 64.)

1. **APPEAL AND ERROR—Dismissal—Grounds.** A proceeding in error, brought to this court on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served, or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

2. **SAME—Effect of Appearance.** The entering of a general appearance by the defendant in error in a proceeding in error in this court does not waive the right to object to the sufficiency of the case-made, where it is shown that neither the defendant in error nor his counsel waived, or were given notice of, the time and place of the signing and settling of the same, when no amendments are suggested.

(Syllabus by the Court.)

Error from Okmulgee County Court;
George A. Johns, Judge.

Action between Thomas E. Richardson and Joseph N. Thompson. From the judgment, Richardson brings error. Dismissed.

Eaton & Carter, for plaintiff in error.

Mathews & Ellison, and *Van H. Albertson,* for defendant in error.

DUNN, J. This case presents error from the county court of Okmulgee county. October 12, 1911, there was filed in that court a petition in error with a purported case-made attached. April 24, 1912, defendant in error filed a motion to dismiss the same, for the reason, among others, that neither the defendant in error nor his counsel was present at the settlement of the said case-made by the court below; nor was any notice of the time thereof served on the defendant in error or his counsel; nor was

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a notice of said settlement or the right to be present at said settlement waived by the defendant in error or his counsel. An inspection of the case-made verifies the facts stated in the motion; and, furthermore, that no amendments were offered. It is contended in the answer brief that, by reason of defendant in error having entered his general appearance in this cause, he is not entitled to be heard to complain that he was not present at the time the case-made was settled and signed. As the conclusion to which we have come necessitates a dismissal of the case, it will not be necessary to consider the other causes assigned.

It is the settled rule of this court, under numerous authorities, on a proceeding in error, brought on a case-made, where it does not appear from the record or otherwise that the defendant was present, either personally or by counsel, at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, that the same will be dismissed on motion of defendant in error. *First Nat. Bank of Collinsville v. Daniels,* 26 Okla. 383, 108 Pac. 748; *Ft. Smith & W. R. Co. v. State Nat. Bank of Shawnee,* 25 Okla. 128, 105 Pac. 647, and authorities therein cited. The signing and settling of a case-made is a judicial act; and, in order that the trial judge may acquire jurisdiction to act, it is essential that notice of the time and place of the signing and settling of the case-made be either given or waived, or that amendments suggested be allowed; and where this is not done the signing and settling of the case-made is without force or effect.

Nor will the entering of a general appearance by the defendant in error waive this defect. *J. W. Ripey & Son v. Art Wall Paper Mills,* 27 Okla. 600, 112 Pac. 1119.

The motion to dismiss must be sustained.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

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CHICAGO, R. I. & P. RY. CO. v. BRAZZELL.

No. 3214. Opinion Filed May 14, 1912.

(124 Pac. 40.)

1. **APPEAL AND ERROR—Record—Scope and Contents—Petition for Removal.** A petition and bond for removal, having been duly incorporated in a valid case-made, thereby becomes a part of the appeal record without a bill of exceptions.

2. **REMOVAL OF CAUSES—Proceedings—Effect of Application.** The question presented to the trial court when a petition for removal is filed, accompanied by proper bond, is one of law arising on the sufficiency of the petition, and, where the question of the right of removal arises out of the facts averred, the same cannot be tried in the state court; for jurisdiction to hear and determine this question is vested exclusively in the federal court to which removal is sought.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by C. M. Brazzell against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

C. O. Blake, H. B. Lowe, R. J. Roberts, W. H. Moore, and *J. H. Woods,* for plaintiff in error.

H. H. Smith, for defendant in error.

DUNN, J. This case presents error from the district court of Pottawatomie county. On November 3, 1910, C. M. Brazzell, defendant in error, as plaintiff, brought his action against plaintiff in error for the recovery of $25,000 damages for personal injuries, alleged to have been received by him on or about August 17, 1910. Plaintiff alleged in his petition that he was a resident of the state of Tennessee. Within due time and prior to filing its answer, the defendant filed a petition for removal, in which it alleged that the time had not elapsed within which it was permitted to answer the petition, and that the plaintiff was, at the

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time of the institution of the suit, and still was, a citizen of the state of Oklahoma residing in Pottawatomie county; that the defendant was, at the time of the institution of the suit, and ever since had been, a corporation organized under and by virtue of the laws of the states of Illinois and Iowa, with its principal place of business in the city of Chicago, and was a nonresident of the state of Oklahoma; that the controversy was between citizens of different states, and was a civil action, where more than $2,000, exclusive of interest and costs, was involved. The prayer of the petition was that the state court proceed no further, except to make the order of removal, as required by law. Accompanying the said petition was a sufficient bond, as provided by the statute. This prayer was denied. The defendant was required to and did answer, and the case came regularly on for trial, resulting in a verdict for plaintiff, and the cause has been lodged in this court for review.

Counsel for defendant present the denial of removal by the state court as ground for reversing or setting aside the judgment rendered herein. It is contended by counsel for plaintiff that the question is not properly preserved, because the petition for removal is not a part of the judgment roll, and that, in order to make it a part of the record on appeal, the petition and proceedings with respect thereto should be incorporated into a bill of exceptions, and also that if the question is properly raised the case was not removable. In neither of these contentions are we able to concur. The record before us is a case-made, which, for this purpose, takes the place of a bill of exceptions. Plaintiff's petition, the petition for removal, and the bond are all made part of the case-made, duly certified by the trial judge, and are regularly before us for our consideration. Where such is the case, a bill of exceptions is not necessary in order to save the appeal record. Burdick's New Trials and Appeals, sec. 207, and cases cited; *Leavenworth, Northern & Southern Ry. Co. v. Herley et al.*, 45 Kan. 535, 539, 26 Pac. 23; *Shumaker et al. v. O'Brien*, 19 Kan. 476.

On the question of whether this action was removable or not, we think there can be no doubt. In at least three cases de-

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cided by this court, the question has been passed upon, all adversely to plaintiff's contention. *Choctaw, O. & G. Ry Co. v. Burgess,* 21 Okla. 110, 95 Pac. 606; *Bolen-Darnell Coal Co. v. Kirk,* 25 Okla. 273, 106 Pac. 813, 26 L. R. A. (N. S.) 270; *Western Coal & Mining Co. et al. v. Osborne,* 30 Okla. 235, 119 Pac. 973. The question presented to the trial court in this case was simply one of fact, which all of the later federal as well as state courts hold is determinable only by the federal Circuit Court, the rule being that when a petition for removal is filed, accompanied by proper bond, the only question then presented for determination by the state court is one of law arising on the sufficiency of the petition. And where the question of the right of removal arises out of the facts averred, the question cannot be tried in the state court, but jurisdiction to hear and determine it is transferred to and vested in the federal court to which the removal is sought. This statement of the rule appears to meet with the sanction of all of the courts which have latterly had occasion to pass on the same. See Black's Dillon on Removal of Causes, secs. 191, 192; Moon on the Removal of Causes, sec. 177; 10 Ency. of U. S. Supreme Court Reports, 703; 34 Cyc. 1305, where the cases are collected.

Discussing the apparent conflict which exists between the authorities on the question of jurisdiction to determine the right of removal in section 191, Black's Dillon on the Removal of Causes, *supra,* it is said:

"In regard to the question whether the state court or the federal court is invested with jurisdiction to determine upon the removability of the cause, and the regularity and sufficiency of the steps which have been taken to effect its removal, there is much apparent conflict between the authorities. But they may be nearly all reconciled, and the true rules evolved, by paying due attention to the difference between questions of fact and questions of law, and to the nature of the questions which present themselves to the state court and the federal court, respectively, upon an application for removal. In the first place, it is settled beyond any manner of doubt that questions of fact arising upon an application for the removal of a cause are to be tried and determined in the federal court alone. Issues of fact upon the petition cannot be raised in the state court. That court must take the facts to be as they are stated in the record and the petition; it

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has no jurisdiction to pass upon any such questions; that is the exclusive province of the federal court, citing *Stone v. South Carolina,* 117 U. S. 430, 6 Sup. Ct. 799 [29 L. Ed. 962]; *Burlington, C. R. & N. R. Co. v. Dunn,* 122 U. S. 513, 7 Sup. Ct. 1262 [30 L. Ed. 1159]; *Crehore v. Ohio & M. R. Co.,* 131 U. S. 240, 9 Sup. Ct. 692 [33 L. Ed. 144]; *Sinclair v. Pierce* [C. C.] 50 Fed. 851; *Waite v. Phoenix Ins. Co.* [C. C.] 62 Fed. 769; *Powers v. Chesapeake & O. R. Co.* [C. C.] 65 Fed. 129; *Fidelity Trust Co. v. Newport News & N. V. Co.* [C. C.] 70 Fed. 403. For example, if any question is raised as to the actual citizenship of either of the parties, when the removability of the case depends upon the diversity of their citizenship, this issue is triable only in the federal court; the state court must assume that the facts as to citizenship are as they appear in the record and are alleged in the petition for removal; and it cannot receive and consider any evidence to the contrary, citing *Carson v. Hyatt,* 118 U. S. 279, 6 Sup. Ct. 1050 [30 L. Ed. 167]; *Kansas City, Ft. S. & M. R. Co. v. Daughtry,* 138 U. S. 298, 11 Sup. Ct. 306 [34 L. Ed. 963]; *De Wolf v. Rabaud,* 1 Pet. 476 [7 L. Ed. 227]."

On the procedure proper to be followed by a state court on the filing of an application for removal, when the same is duly and seasonably made, the same authority, at section 192, says:

"When an application for the removal of a cause from a state court to a federal court is duly and seasonably made by the filing of a proper and sufficient petition and bond, and the removal papers, in connection with the record, show that the case is within the act of Congress, it is the duty of the state court, under the statute, to 'accept said petition and bond and proceed no further in such suit.' All rightful jurisdiction of the state court over the cause immediately ceases. It makes no difference whether that court grants or refuses an order of removal. Its jurisdiction being at an end, any further step taken in the cause in that court, or any order, judgment, or decree made by it, is erroneous and voidable, if not absolutely void. And however long the question of the removability of a suit may be litigated in the federal courts, and although those courts may ultimately decide to remand it to the state court, no valid action or proceeding can be taken in the state court before the remand."

The same doctrine is announced at section 177 of Moon on the Removal of Causes, as follows:

"The later decisions deny to the state court all authority to inquire into the truth of the facts alleged in the petition for re-

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moval. Its statements of the facts of the case, no matter whether true or false, must be accepted as true by the state court. The plaintiff may, in the Circuit Court of the United States, question the truth of the petition for removal; but he cannot be heard to do so in the state court."

In addition to the authorities cited in support of the texts above noted, we note the following: *Postal Telegraph Cable Co. v. Southern Ry. Co.* (C. C.) 88 Fed. 803; *Carson v. Hyatt et al.*, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed .167; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963.

On this question Circuit Judge Simonton of the Circuit Court for the Western District of North Carolina, in the case of *Postal Telegraph Cable Co. v. Southern Ry. Co., supra*, said:

"The petition for removal, with proper bond, was filed before the time for answering had expired. This petition averred the two jurisdictional facts: (1) The diversity of citizenship; (2) that the matter in controversy exceeded the value of $2,000, exclusive of interest and costs. Upon the truth of these facts, of both of them, depends the right of removal. *Powers v. Railway Co.*, 169 U. S. 99, 18 Sup. Ct. 264 [42 L. Ed. 673]. Issue was joined upon one of these facts—the jurisdictional amount; and the superior court, inadvertently it is sure, passed upon that issue. It could be decided nowhere but in this court. *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050 [30 L. Ed. 167]; *Carson v. Dunham*, 121 U .S. 421, 7 Sup. Ct. 1030 [30 L. Ed. 992]; *Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262 [30 L. Ed. 1159]; *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306 [34 L. Ed. 963]. This being the case, and the petition on its face stating the two essential facts for removal, the case was *ipso facto* removed, and the state could proceed no further, upon the filing of the petition and bond; that is, just as soon as they were filed. *Gordon v. Longest*, 16 Pet. 97 [10 L. Ed. 900]; *Insurance Co. v. Dunn*, 19 Wall. 214 [22 L. Ed. 68]; *Kern v. Huidekoper*, 103 U. S. 485 [26 L. Ed. 354]; *Railroad Co. v. Koontz*, 104 U. S. 5 [26 L. Ed. 643]."

The best discussion which we have seen on the proposition is contained in the case of *Burlington, Cedar Rapids & N. Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, in which the late Chief Justice Waite of the Supreme Court of the United

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States, discussing the previous holding of that court on this question, said:

"It must be confessed that previous to the cases of *Stone v. South Carolina,* 117 U. S. 430, 432 [6 Sup. Ct. 799, 29 L. Ed. 962], and *Carson v. Hyatt,* 118 U. S. 279 (6 Sup. Ct. 1050, 30 L. Ed. 167], decided at the last term, the utterances of this court, on that question, had not always been as clear and distinct as they might have been. Thus, in *Gordon v. Longest,* 16 Pet. 97, 103 [10 L. Ed. 900], in speaking of removals under section 12 of the judiciary act of 1789, it was said, 'it must be made to appear to the satisfaction of the state court that the defendant is an alien, or a citizen of some other state than that in which the suit was brought'; and in *Railway Company v. Ramsey,* 22 Wall. 322, 328 [22 L. Ed. 823], that 'if upon the hearing of the petition it is sustained by the proof, the state court can proceed no further.' In other cases expressions of a similar character are found, which seem to imply that the state courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. At the last term it was found that this question had become a practical one about which there was a difference of opinion in the state courts, and to some extent in the circuit courts, and so, in deciding *Stone v. South Carolina, supra,* we took occasion to say: 'All issues of fact made upon the petition for removal must be tried in the Circuit Court; but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. It is true, as was remarked by the Supreme Judicial Court of Massachusetts, in *Amy v. Manning,* 144 Mass. 153 [10 N. E. 737], that this was not necessary to the decision in that case; but it was said on full consideration and with the view of announcing the opinion of the court on that subject. Only two weeks after that case was decided, *Carson v. Hyatt, supra,* came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine where the fact really was. We there affirmed what had been said in *Stone v. South Carolina, supra,* and decided that it was error in the state court to proceed further with the suit after the petition for removal was filed, because the Circuit Court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson v. Dunham,* 121 U. S. 421 [7 Sup. Ct. 1030, 30 L. Ed. 992], and is in entire harmony with all that had

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been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds, it is the true rule, and calculated to produce less inconvenience than any other. The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case, and the highest court of the state affirms its decision, this court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. *Stone v. South Carolina,* 117 U. S. 430 [6 Sup. Ct. 799, 29 L. Ed. 962], and cases there cited. But, even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. *Railroad Company v. Koontz,* 104 U. S. 5, 15 [26 L. Ed. 643]. In that case, the same as in the writ of error to the state court, the question will be decided on the face of the part of the record of the state court which ends with the petition for removal; for the Circuit Court can no more take a case until its jurisdiction is shown by the record, than the state court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record, namely, that in the state court ending with the petition for removal."

From the foregoing authorities, it will be seen that, notwithstanding the fact that a trial has taken place and a judgment rendered in favor of plaintiff, the proceedings in the state court were conducted at a time when it was wholly without jurisdiction. The fact that it may have eventuated that its conclusion on the removal of this cause was correct, and that the same was not removable, in no wise changes the situation. The state court had no more authority or jurisdiction to decide right on this question than it had to decide wrong. It simply lacked the power to de-

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cide at all. The question presented was one of fact, jurisdiction to determine which, as we have seen from the above authorities, is vested exclusively in the federal court. This is the holding of the Supreme Court of the United States in the construction of the removal statute, and its decision is binding on this court. Under these conditions, the trial had, the proceedings taken, and the judgment rendered, subsequent to the filing of the petition for removal, are mere nullities, of no consequence whatsoever, and tantamount to never having taken place.

The cause is therefore remanded to the district court of Pottawatomie county, with instructions to set aside the judgment which has heretofore been rendered and take such proceedings in accordance with this opinion as the parties may elect.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

LOVEJOY, RUSSELL & JAMES v. GRAHAM *et al.*

No. 3346. Opinion Filed May 14, 1912.

(124 Pac. 25.)

APPEAL AND ERROR—Case-Made. An order extending the time for the making and serving a case-made, made after the expiration of the time fixed by former order of the court or trial judge, is void.

(a) A case-made made and served within the time fixed by such void order is a nullity, and cannot be considered as such by this court.

(Syllabus by the Court.)

Error from District Court, Garvin County; R. McMillan, Judge.

Action by J. W. Graham and others against Lovejoy, Russell & James. Judgment for plaintiffs, and defendants bring error. Dismissed.

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Giddings & Giddings and *Jas. S. Twyford,* for plaintiffs in error.

J. W. Thompson and *B. W. Patterson,* for defendants in error.

WILLIAMS, J. Motion for new trial, having been filed in due time, was overruled on May 29, 1911. The court on said date also made the following order:

"And defendants are given by the court, in open court, ninety days to make, then ten days for plaintiff to suggest amendments and five days to settle a case-made for the Supreme Court and sixty days thereafter to file same, with petition in error, in the Supreme Court."

Plaintiffs would not be required to suggest amendments until the case-made had been made and served upon them. The case-made was not served upon the plaintiffs until after said ninety days had expired; but it is insisted by the plaintiffs in error that it was served upon plaintiffs within fifteen days after the expiration of said ninety days, and that until the ten days allowed to suggest amendments and five days to settle had expired the court had jurisdiction to make an order extending the time in which to make and serve a case-made; but no authorities have been cited by counsel to sustain this contention, and we think that none can be found.

It is settled that an order made after the expiration of the time allowed for making and serving a case-made, extending the time for such purpose, is a nullity; and a case-made served out of such time cannot be considered. *Mutual Trust Co. v. Farmers' Loan & Security Co.,* 27 Okla. 414, 112 Pac. 967; *Lathim v. Schlack,* 27 Okla. 522, 112 Pac. 968; *Maddox v. Drake,* 27 Okla. 418, 112 Pac. 969; *Soliss v. Davis,* 28 Okla. 496, 114 Pac. 609; *Ellis et al. v. Carr,* 25 Okla. 874, 108 Pac. 1101; *Bettis v. Cargile et al.,* 23 Okla. 301, 100 Pac. 436.

It follows that this proceeding in error must be dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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LOVE *et al.* v. FILTSCH *et al.*

No. 3388. Opinion Filed May 14, 1912.

(124 Pac. 30.)

1. **STATES—Action Against.** Suits against officers of a state as representing the state in action and liability, and in which the state, although not a party to the record, is the real party against which relief is sought, and in which a judgment for plaintiff, although nominally against defendant as an individual, could operate to control the action of the state or subject it to liability, are suits against the state.

2. **SAME.** A proceeding in mandamus brought for the purpose of requiring the auditing and allowance of a disputed claim for rent growing out of a private contract between the state and parties owning property occupied by state officials, is an action brought against the state, and cannot be maintained except with its consent.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; E. D. Oldfield, Judge.

Application by Theresa Filtsch and others for writ of mandamus against J. E. Love and others. From an order granting the writ, defendants bring error. Reversed, and case dismissed.

Charles West, Atty. Gen., and *C. J. Davenport,* Asst. Atty. Gen., for plaintiffs in error.

S. A. Cordell, for defendants in error.

DUNN, J. This case presents error from the superior court of Oklahoma county, and is a proceeding in mandamus brought by plaintiffs, who were owners of a certain building located in Guthrie which had, under contract with the state, been occupied by the Corporation Commission of the state for its offices. On the removal of the seat of government from Guthrie to Oklahoma City, the Corporation Commission, without giving notice of the termination of its tenancy, ceased to use the property, and on being presented with a bill for the amount of the rent claimed to

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be due, which amount was disputed, the chairman of the Corporation Commission, Hon. J. E. Love, refused to approve the same, as did also the State Board of Public Affairs, and the State Auditor refused to issue a warrant therefor. A peremptory writ commanding the performance of these acts was issued by the trial court and the officers represented by the Attorney General have brought the case to this court for review.

While it is true that a state, on entering into a contract, lays aside its attributes of sovereignty and binds itself in substantially the same way as does one of its citizens when he enters into a contract, and contracts of a state are interpreted and controlled by the same laws as contracts of individuals, and also that a state has no lawful right to refuse payment of a just claim, yet, as was said by Justice Elliott of the Supreme Court of Indiana in the case of *Carr v. State,* 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624:

"There is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued."

Or, as was said by Justice Bradley of the Supreme Court of the United States in the case of *Hans v. State of Louisiana,* 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842:

"The obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the state consents to be sued, or comes itself into court."

While it is true that the state in the case at bar is not a party defendant as such, still, as was said by Justice Lamar in the case of *Pennoyer et al. v. McConnaughy,* 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, it is "well settled that a suit against the officers of a state to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the state itself." And to the same effect is the case of *State ex rel. Davis v. Mortensen et al.,* 69 Neb. 376, 95 N. W. 831, annotated

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5 Ann. Cas. 291. In that case, written by Sullivan, C. J., dealing with the question of the suability of the state and of its liability on its contracts, in the syllabus it is said:

"A writ of mandamus will not issue against the members of a state board of public lands and buildings to compel specific performance of a contract made by them for the leasing of convict labor, as the proceeding is in substance an action against the state to enforce performance of a contract made by it. The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings in Nebraska, as a governmental agency having full authority in all matters relating to the management of the penitentiary, is vested with power to determine whether a contract for the leasing of convict labor shall be kept or broken. The action of the members of the board in the matter is the action of the state; their determination is its determination."

Discussing the issue involved, which appears to have been the enforceability of a contract between the warden of the penitentiary and a manufacturer providing for the employment of convicts, and which it was sought to enforce by mandamus, the court said:

"The contract purports to be the contract of the warden, but, assuming it to be valid, it is in truth the contract of the state; and the present action is in substance a suit against the state for specific performance. *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608 [29 L. Ed. 805]; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164 [31 L. Ed. 216]; *People v. Dulaney*, 96 Ill. 503; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007 [76 Am. St. Rep. 811]; *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97, 42 N. W. 593; *Board of Public Works v. Gannt*, 76 Va. 455; 13 Encyc. of Pl. and Pr. 654. An action to enjoin state officers from doing acts which would constitute a breach of a contract with the state, and thus indirectly to compel specific performance, was held, in *Ex parte Ayers, supra*, to be a suit against the state. And in *Hagood v. Southern, supra*, it was decided that an action against state officers is an action against the state, where the things required by the decree to be done are the very things which when done will constitute a performance of the state's contract. It was held in *People v. Dulaney, supra*, that the courts have no authority to compel by mandamus the performance of a business contract like the one here in question; and such seems to be the general rule. *Parrott v. Bridgeport*, 44 Conn. 180 [26 Am. Rep.

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439]; *State v. Zanesville, etc., Turnpike Road Co.*, 16 Ohio St. 308; *State v. Howard County Ct.*, 39 Mo. 375. But if the rule were otherwise, and if the contract were valid, the action could not be maintained. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. *Davis v. Gray*, 16 Wall. 203 [21 L. Ed. 447]; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240 [27 L. Ed. 171]; *Poindexter v. Greenhow*, 109 U .S. 63, 3 Sup. Ct. 8 [27 L. Ed. 860]; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292 [27 L. Ed. 992]; *Com. v. Weller*, 82 Va. 721, 1 S. E. 102. A state may, of course, lay its sovereignty aside and consent to be sued on such terms and conditions as it may prescribe."

Another case, in which the facts are more nearly allied to those in the case at bar, is that of *Wilson v. Louisiana Purchase Exposition Commission et al.*, 133 Iowa, 586, 110 N. W. 1045, 119 Am. St. Rep. 646. The action was brought by the plaintiff for a writ of mandamus to compel the Louisiana Purchase Exposition Commission of the state of Iowa to pay him the sum of $200, which he claimed to be due him under a contract made with the said commission. It appeared that, by an act of the General Assembly, the commission was formed and an appropriation made to cover its expenditures. Among the duties delegated to it was the auditing and passing upon claims which were presented for allowance. Plaintiff alleged that it had been employed, had performed certain services at an agreed price, but that his claim for the same had been disallowed. Among the defenses was that the action was a suit against the state, and hence could not be maintained. The court discussing these facts, speaking through Justice Sherwin, said:

"The Louisiana Purchase Exposition Commission was a creature of the state, created for the specific purpose of representing the state and its interests at the exposition bearing its name. All expenses incurred by it in the execution of its delegated powers were payable from the funds of the state set apart by legislative authority for that express purpose. The commission was clearly but an agent of the state through whom the public funds were to be disbursed, and this disbursement was authorized by law only upon the exercise of the discretion and judgment of the commission. While the state is not named as a party in the action, it is quite clear to us that it is in fact the actual party in interest. If the writ prayed for were to be issued, it would com-

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pel the defendant to make a draft upon state funds; in other words, the effect thereof would be to compel the state itself to pay the plaintiff's claim, which is an unliquidated demand for which no specific provision has been made from state funds. It is fundamental that a state cannot be sued in its own courts without its consent, and it is a further rule that a litigant will not be permitted to evade the general rule by bringing action against the servants or agents of the state to enforce satisfaction for claims."

To the same effect, see *Board of Public Works et al. v. Gannt et al.*, 76 Va. 455; *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364; *Swann v. Buck*, 40 Miss. 268; *People ex rel. McCauley et al. v. Brooks*, 16 Cal. 11; *Weston v. Dane*, 51 Me. 461; *Aplin v. Board of Supervisors*, 73 Mich. 182, 41 N. W. 223, 16 Am. St. Rep. 576; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *In re Ayers*, 123 U. S. 443, 489, 8 Sup. Ct. 164, 31 L. Ed. 216. See, also, 36 Cyc. 915.

The matter in suit is a private contract. There is no law making a specific, definite appropriation to cover it, and the amount claimed to be due is disputed, and this action is just as much a suit against the state for the recovery of the rent due under the contract, as if the state were a private party against whom a judgment was sought, on which execution might issue to be levied on property to cover the amount thereof; for the result of the judgment sought by plaintiffs would be a mandate requiring the defendants to approve plaintiffs' demand and issue a warrant for its payment, which in turn would be presented to the Treasurer of the State on which the money to cover the amount thereof would be paid.

As the state has not given its consent to being thus sued, but, on the contrary, vigorously objects, it therefore follows that the judgment of the trial court must be reversed, and the case dismissed, which is accordingly done.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

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McKEE *et al.* v. De GRAFFENREID *et al.*

No. 3555. Opinion Filed May 14, 1912.

(124 Pac. 303.)

1. **MANDAMUS — Subjects of Relief — Trial by Jury.** Mandamus may issue to require a judge of the district court to grant a "person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint made or entered by" such court or judge, a trial by jury, "before penalty or punishment is imposed."

2. **CONSTITUTIONAL LAW—Operation and Effect—Self-Executing Provisions.** The proviso to section 25, art. 2 (Bill of Rights), of the Constitution, providing "that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused," is effective, and, as supplemented by the provisions of the common law as to contempts, which is in force in this state by statute (section 5534, Comp. Laws 1909), and the statutory provisions of our Code relative to jury trials, supplies a sufficient rule by means of which the right given under said proviso may be exercised or enforced.

(Syllabus by the Court.)

Original action in mandamus by C. F. McKee and others against R. P. De Graffenreid and others. Writ granted.

Blakeney, Maxey & Miley, for plaintiffs.

Kistler, McAdams & Haskell, for defendants.

WILLIAMS, J. The plaintiffs, C. F. McKee, S. McKee, and F. McKee, were duly charged with violating or disobeying, when not in the presence or hearing of the court or judge, an order of injunction or restraint made or rendered by the court or the judge of the said court. Said plaintiffs in due time demanded a trial by jury as to their guilt or innocence of the charge, which was denied. This proceeding in error is brought that the judge of said court may be required to grant said plaintiffs a trial by jury, as provided by section 25, art. 2 (Bill of Rights), of the

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Constitution of this state. It is essential to determine (1) whether mandamus is the proper remedy, and (2) whether said section 25 is self-enforcing.

1. It is settled in this jurisdiction that a party adjudged guilty of contempt may prosecute an appeal from such order or judgment. *Smythe v. Smythe,* 28 Okla. 266, 114 Pac. 257. On review, this court will determine whether any error has been committed against the party appealing, and, if so, and a substantial right is involved, a reversal will follow.

In *Gompers et al. v. Bucks Stove & Range Co.,* 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it is said:

"Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' *Bessette v. W. B. Conkey Co.,* 194 U. S. 329, 24 Sup. Ct. 665, 48 L. Ed. 1002. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt, the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive; and many civil contempt proceedings have resulted, not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but it is intended to be remedial by coercing the defendant to do what he refused to do. The decree in such cases is that the defendant stand committed until he performs the affirmative act required by the court's order. For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. * * *"

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See, also, *In re Merchants' Stock & Grain Co. et al., Petitioners,* 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. ——.

In *Ex parte Gudenoge,* 2 Okla. Cr. 110, 100 Pac. 39, section 2125, Wilson's Rev. & Ann. St. 1903, dividing contempts into two classes, direct and indirect, and defining direct contempt as consisting of "disorderly and insolent behavior committed during the session of the court and in its immediate view and presence, and the unlawful and willful refusal of any person to be sworn as a witness," was considered by the Criminal Court of Appeals on the assumption that it was brought over by virtue of the Schedule to the Constitution; the question not being directly passed upon.

In *Smythe v. Smythe, supra,* this question was considered, and, under the authority of *Smith v. Speed,* 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402, wherein said act was held to be in conflict with the organic act and therefore void, it was held that such section was not continued in force after the erection of the state. See *De Graff v. State,* 2 Okla. Cr. 519, 103 Pac. 538. In this state the common-law rule as to contempts now applies. In either civil or criminal contempt, punishment by imprisonment may be imposed. That being so, would an appeal be an adequate remedy?

In *Evans v. Willis, County Judge,* 22 Okla. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050, 18 Ann. Cas. 258, it is said:

"There is no general rule by which the adequacy or inadequacy of a remedy can be ascertained; but the question is one to be determined upon the facts of each particular case. The writ will not be issued on account of the inconvenience, expense, or delay of other remedies, but will be granted where the remedy available is insufficient to prevent immediate injury or hardship to the party complaining, particularly in criminal cases. 16 Enc. Pl. & Pr. p. 1131, and authorities cited in footnotes 1 and 2. It appears that in criminal cases neither appeal, *habeas corpus,* nor *certiorari* would be a plain, speedy, or adequate remedy. 16 Enc. Pl. & Pr. p. 1132, and authorities cited in footnote 1."

See, also, *Herndon v. Hammond,* 28 Okla. 616, 115 Pac. 775.

It seems to be settled in this jurisdiction that the remedy afforded by appeal is not adequate where a party may be imprisoned.

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In *Bardstown v. Hurst,* 121 Ky. 119, 89 S. W. 147, 724, the petitioner was being prosecuted for the violation of an ordinance of a municipal corporation in territory which had been illegally annexed to the city; the illegality consisting in the invalidity of the ordinance annexing the same. The court held that a writ of prohibition would issue to restrain the prosecution.

In *State v. Moultrieville,* Rice (S. C.) 158, the court held that a writ of prohibition would issue to restrain the collections of fines imposed for violations of a municipal ordinance, where the court imposing the same, by reason of the amount involved, had no jurisdiction of the case.

It has been held that a prosecution for the violation of a town ordinance is a civil and not a criminal action. *Fortune v. Incorporated Town of Wilburton,* 5 Ind. T. 252, 82 S. W. 738, 5 Ann. Cas. 287; *Id.,* 142 Fed. 114, 73 C. C. A. 338, 4 L. R. A. (N. S.) 782, 6 Ann. Cas. 565; *Everts v. Town of Bixby,* 24 Okla. 176, 103 Pac. 621.

True we have held that a writ of mandamus would not lie to compel a justice of the peace to reverse his erroneous ruling in denying an application for a change of venue, for the reason that defendants had a plain and adequate remedy by appeal (*Winfrey v. Benton et al.,* 25 Okla. 445, 106 Pac. 853); but in a contempt proceeding, whether criminal or civil action, the court may impose imprisonment.

If the plaintiffs, or relators here, are entitled to a jury trial, and they are remitted solely to the right of appeal for the correction of error, though it be a civil contempt, they would be put to the same inconvenience and danger of imprisonment as in case of conviction in a criminal action.

In *Carpenter v. County Commissioners of the County of Bristol,* 21 Pick. (Mass.) 258, it was held that mandamus will lie to compel the granting of a trial by jury in a civil action, where the party would not have a plain and adequate remedy by appeal.

In Utah, mandamus has been awarded in civil actions to require the trial court to permit the relator to have a jury trial, without the question as to mandamus being a proper remedy be-

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ing raised. *State ex rel. Hansen v. Hart,* 26 Utah, 229, 72 Pac. 938; *Nichols v. Cherry,* 22 Utah, 1, 60 Pac. 1103.

The same reason exists for invoking such extraordinary remedy in case of civil contempt as in criminal actions. Therefore we hold that mandamus is a proper remedy in this proceeding.

2. Is section 25, art. 2 (Bill of Rights), of the Constitution self-executing or self-enforcing?

Section 5534, Comp. Laws 1909 (section 3874, St. Okla. 1893), provides:

"The common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the General Statutes of Oklahoma. * * *"

This statute remained in force after the erection of the state by virtue of section 2 of the Schedule, except as it may have been rendered inapplicable on account of local conditions. By this section, the common law as to contempt, which was in force in the territory of Oklahoma, continued with the limitations therein imposed after the erection of the state.

Under section 25, art. 2 (Bill of Rights), and section 2 of the Schedule to the Constitution, the common law as to contempts, as modified by the proviso contained in said section 25, to wit, "that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused," remained in force after the erection of the state. *Bowman v. Bilby,* 24 Okla. 735, 104 Pac. 1078; *Apache State Bank v. Daniels,* 32 Okla. 121, 121 Pac. 237.

Under our Code, complete procedure is prescribed for a trial by jury in criminal cases. Article 7, 8, 9, 10, and 11 of chapter 89, Comp. Laws 1909. Such is also the case as to civil actions. Chapter 55 and article 14 of chapter 87, Comp. Laws 1909. See, also, section 21 of article 7 of the Constitution.

The proviso to said section 25, art. 2 (Bill of Rights), of the Constitution of this state, is effective, and, as supplemented by the

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provisions of the common law as to contempts, which is in force in this state by statute (section 5534, Comp. Laws 1909), and the statutory provisions of our Code relative to juries and jury trials, supplies a sufficient rule by means of which the right given under said proviso may be exercised or enforced. *Ex parte McNaught,* 23 Okla. 285, 100 Pac. 27; *Ex parte Wagner,* 21 Okla. 33, 95 Pac. 435, 18 Ann. Cas. 197; *State ex rel. Reardon v. Scales,* 21 Okla. 683, 97 Pac. 584; *Spade v. Morton et al.,* 28 Okla. 384, 114 Pac. 724; *Smith v. Harrod,* 29 Okla. 3, 115 Pac. 1015; *Tilley v. Overton,* 29 Okla. 292, 116 Pac. 945; *Cowart v. State,* 4 Okla. Cr. 122, 111 Pac. 672.

It follows that the plaintiffs (relators) were entitled to a trial by jury. If, on being advised as to the conclusion herein reached, an order is not entered in the court below granting the relators a trial by jury as to such issue, the writ will issue.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

STATE *ex rel.* IKARD, v. RUSSELL, *Judge.*

No. 3584. Opinion Filed May 14, 1912.

(124 Pac. 1092.)

1. **COURTS—Supreme Court—Following Criminal Court of Appeals.** It is the settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction.

2. **OFFICERS—Misconduct—Actions—Jurisdiction — District Courts.** The prohibition in Const. art 7, sec. 12, against the exercise by the county court of jurisdiction in actions against officers for misconduct in office, includes all actions against such officers for misconduct, and jurisdiction over such proceedings is in the district court.

(Syllabus by the Court.)

Application by the State, on relation of M. Ikard, for writ of prohibition to Stilwell H. Russell, Judge of the District Court. Writ denied.

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Johnson & McGill, Cruce & Potter, and *R. A. Hefner,* for relator.

James H. Mathers and *W. F. Bowman,* for respondent.

KANE, J. This is an original application for writ of prohibition for the purpose of prohibiting the district court of Carter county, Okla., from proceeding to try the relator on a charge of nepotism. After defining nepotism, the statutes (section 2800, Comp. Laws 1909) provide that "any executive, legislative, ministerial or judicial officer who shall violate any provision in this act shall be deemed guilty of a misdemeanor involving official misconduct, and shall be punished by a fine of not less than one hundred or more than one thousand dollars, and shall forfeit his office." The relator contends that upon the authority of *State ex rel. v. Shea, Judge,* 28 Okla. 821, 115 Pac. 862, the district court is without jurisdiction to try misdemeanors of every grade, whether they involve official misconduct or not. The Shea case, while not exactly in point, seems to sustain that contention, but, at the time that opinion was written and handed down, our attention was not called to *Ex parte Moody,* 3 Okla. Cr. 590, 108 Pac. 431, where a different conclusion seems to have been reached by the Criminal Court of Appeals in construing the same constitutional provision in its application to a criminal case.

It is the settled policy of the Supreme Court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction. *Ex parte Justus,* 26 Okla. 101, 110 Pac. 907; *Flood v. State ex rel.,* 27 Okla. 852, 113 Pac. 914; *Herndon v. Hammond, County Judge,* 28 Okla. 616, 115 Pac. 775. Section 12, art. 7, Williams' Ann. Const. Okla., provides:

"The county court, co-extensive with the county, shall have original jurisdiction in all probate matters, and until otherwise provided by law, shall have concurrent jurisdiction with the district court in civil cases in any amount not exceeding one thousand dollars, exclusive of interest: Provided, that the county court shall not have jurisdiction in any action for malicious prosecution, or in any action for divorce or alimony, or in any action against officers for misconduct in office, or in actions for slander

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or libel, or in actions for the specific performance of contracts for the sale of real estate, or in any matter wherein the title or boundaries of land may be in dispute or called in question; nor to order or decree the partition or sale of real estate, not arising under its probate jurisdiction."

Discussing this provision in *Ex parte Moody, supra,* Presiding Judge Furman, said:

"The prohibition contained in the Constitution against the exercise, by the county court, of jurisdiction in actions against officers for misconduct in office, is not limited to actions for the removal of such officers from the position which they occupy, on account of the official misconduct, but extends to and includes any and all actions against such officers for misconduct in office, it matters not what the nature of the action or the punishment inflicted may be. * * * Any statute attempting to give jurisdiction to the county courts or justices of the peace to try such cases would be unconstitutional and void. Such jurisdiction is in the district court."

It may be said that the foregoing, in so far as it pertains to the jurisdiction of county courts, is merely *dictum,* but, as the court bases its decision solely upon its construction of the foregoing constitutional provision, its construction is not *dictum* in the sense that it was not necessary to the ascertainment of the question decided by the court. If the Criminal Court of Appeals adheres to that construction, and this court adheres to its opinion in the Shea case, *supra,* it is apparent that an important class of criminal offenses will go unpunished for want of a court to try them. If offenders of that class were proceeded against in the county court, the Criminal Court of Appeals would set them at liberty by *habeas corpus,* and, if they were proceeded against in the district court, this court would stop proceeding by prohibition. The avoidance of such a condition illustrates the wisdom of the policy of following the construction given to criminal statutes by the Criminal Court of Appeals.

As the cause sought to be prohibited is solely a criminal action, without overruling the Shea case we deny the writ, and dismiss the proceeding without prejudice, in order that the relator, if he sees fit, may present the matter to the Criminal Court of Appeals, so that the jurisdiction of county courts in misdemeanor

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cases involving official misconduct may be passed upon by that court in a case wherein the question is directly involved.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

LYNCH v. GARLAND.

No. 1504. Opinion Filed May 14, 1912.

(124 Pac. 55.)

INDIANS—Indian Lands—Allotment. By reason of section 22 of an act of Congress, approved July 1, 1902 (chapter 1375, 32 U. S. St. at L. p. 716; 1 Kappler's Indian Affairs, Laws and Treaties, p. 789), the Commissioner to the Five Civilized Tribes, upon motion made before him, and the Secretary of the Interior, on appeal from an order of said Commissioner, have power at any time before the issuance of patent to an allottee of the Cherokee tribe of Indians, upon notice to such allottee and after hearing, to cancel and set aside a judgment of the Commissioner in a contest awarding to the allottee as contestant the lands allotted to him, when such judgment was procured without service of notice of contest upon the contestee, and without an opportunity given to the contestee to be heard, but upon a false and fraudulent affidavit made by the contestant or one acting for him, showing that such service had been made.

(Syllabus by the Court.)

Error from District Court, Rogers County;
T. L. Brown, Judge.

Action by Charlotta E. Garland against Elzira Lynch, a minor. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Starr & Patten, for plaintiff in error.

J. B. Rutherford and *Parker, Rider & Brown,* for defendant in error.

HAYES, J. The material facts in this case are so similar to the facts in *Lynch et al. v. Harris, ante,* 124 Pac. 50, that it presents identically the same question of law that was presented and

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decided in that case, and it follows upon the authority of that case that the judgment of the trial court should be reversed and the cause remanded, with instructions to enter judgment denying the defendant in error the relief prayed for in his petition filed in the trial court; and it is so ordered.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

McGANNON, *Admx.*, v. STATE *ex rel.* TRAPP *et al.*

No. 2669. Opinion Filed May 14, 1912.

(124 Pac. 1063.)

1. **TAXATION — Statutes — Nature of Tax — Uniformity — Exemptions—Local or Special Laws.** The act of May 26, 1908 (Laws 1908, c. 81, art. 11), which imposes a tax upon inheritances, is a tax upon the transitus of the property, and not upon the property.

   (a) Being a tax on the transitus of property, it is not in conflict with article 10, sec. 6, of the Constitution.

   (b) Said act is not in conflict with section 5, art. 10 of the Constitution.

   (c) Being neither a local nor special law which changes the descent or succession of property, said act is not in conflict with article 5, sec. 46, of the Constitution.

2. **SAME—Levy—Specification of Purpose.** Const. art. 10, sec. 19, providing, "Every act enacted by the Legislature * * * levying a tax, shall specify distinctly the purpose for which the tax is levied. * * *" does not apply to act of May 26, 1908 (Laws 1908, c. 81, art. 11), imposing an inheritance tax upon the transfer of property, but applies only to annually recurring taxes.

3. **STATUTES—Construction—General Rules.** Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or ambiguity, to favor public convenience, and to oppose all prejudice to public interest.

4. **SAME.** In construing tax laws, where there is any ambiguity or doubt, it must be resolved in favor of the person upon whom it is sought to impose the burden.

5. **TAXATION—Inheritance Tax—Rate—"For."** Under Comp. Laws 1909, secs. 7713, 7714, imposing an inheritance tax, fixing the primary rate for class one at one per centum, and providing that, upon all in excess of $5,000 in class one, the primary rate "shall be increased one one hundred-twenty-fifth of one per centum for

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every $100 increase in valuation of such excess," the rate for the entire sum in excess of $5,000 is one and one one hundred-twenty-fifth per cent.; the word "for" meaning "to be applied to."

(Syllabus by the Court.)

Error from District Court, Tulsa County;
L. M. Poe, Judge.

Action by the State, on the relation of M. E. Trapp and others, against Alice S. McGannon, administratrix. From the judgment, defendant brings error. Reversed and remanded.

Virgil Rule and *Ledbetter, Stuart & Bell,* for plaintiff in error.

Chas. West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for the State.

Preston C. West, amicus curiae.

TURNER, C. J. On November 27, 1908, John G. McGannon, a resident of Seneca, Mo., died intestate at Tulsa, Okla., leaving property in this state, appraised by the judge of the county court of Tulsa county at $280,000, subject to an act entitled "An act providing for a tax on gifts, inheritances, bequests, legacies, devises and successions in certain cases," approved May 26, 1908. He left surviving him (it is stipulated) "the following heirs, who will be entitled to receive said property in the following proportions, and under the provisions of said act would be entitled to have said property transferred to them subject to the following exemptions as (and) to said inheritance tax thereon, to wit: Alice S. McGannon, Seneca, Mo., widow, one-half, or $140,000, less $10,000 exemption, leaving amount subject to transfer from said estate to her of $130,000. Peter M. McGannon, Aurora, Mo., brother, one-twelfth, or $23,333.33, less exemption of $500, leaving amount to be taxed at $22,833.33. James F. McGannon, Seneca, Mo., brother, one-twelfth, or $23,333.33, less exemption of $500, leaving amount to be taxed at $22,833.33. Matthew C. McGannon, Nashville, Tenn., brother, one-twelfth, or $23,333.33, less exemption of $500, leaving amount to be taxed at $22,833.33. Thomas G. McGannon, Lowell, Mass., brother, one-twelfth, or $23,333.33, less exemption of $500, leaving amount

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to be taxed at $22,833.33. Susan M. McGannon, Brockville, Ontario, Canada, sister, one-twelfth, or $22,333.33, less exemption of $500, leaving amount to be taxed at $22,833.33. Fred G. McGannon, Winnipeg, Manitoba (formerly of Montreal, Canada), a nephew (descendant of a brother), one forty-eighth, or $5,833.33 less exemption of $500, leaving amount to be taxed at $5,333.33. Mary L. McCormick, a niece, Calgary, Northwest Territory, Canada (descendant of a brother), one forty-eighth, or $5,833.33, less exemption of $500, leaving amount to be taxed at $5,333.33. Edward M. McGannon, a nephew, Brockville, Ontario, Canada (descendant of a brother), one forty-eighth, or $5,833.33, less exemption of $500, leaving amount to be taxed at $5,333.33. Susan M. McGannon, guardian of Wm. Lawrence McGannon, a nephew, Brockville, Ontario, Canada (descendant of a brother), one forty-eighth, or $5,833.33, less exemption of $500, leaving amount to be taxed at $5,333.33."

Concerning the tax imposed by said act on the transfer of the widow's share of the estate, the county judge calculated the same thus:

Alice S. McGannon, the widow:

Inheritance	$140,000 00	
Exemption	10,000 00	
	$130,000 00	
Primary rate of one per cent. on first	5,000 00	$ 50 00
Excess above primary rate	$125,000 00	
Primary rate of one per cent. on $125,000		1,250 00
Add to primary rate one one hundred-twenty-fifth of one per cent.		10 00
		$1,310 00
Less five per cent. on $1,310.00, if paid in year		65 50
Tax		$1,244 50

If this method of calculation is correct, "it is admitted that the assessment made by the county court was correct; and, if this court concurs therein, the assessment should be, viz.:

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	Tax	5% Dis.		Amt. Pd.
Alice S. McGannon	$1,310 00	$ 65 50	equals	$1,244 50
Peter S. McGannon	346 66	17 33	"	329 33
Matthew C. McGannon	346 66	17 33	"	329 33
James F. McGannon	346 66	17 33	"	329 33
Thomas G. McGannon	346 66	17 33	"	329 33
Susan M. McGannon	346 66	17 33	"	329 33
Fred G. McGannon	80 66	4 03	"	76 63
Mary L. McCormick	80 66	4 03	"	76 63
Edward M. McGannon	80 66	4 03	"	76 63
Wm. Lawrence McGannon	80 66	4 03	"	76 63
	$3,365 94	$168 32		$3,197 67"

On appeal to the district court said tax was calculated thus:

$140,000 00, Inheritance.
10,000 00, Exemption.

$130,000 00, Subject to taxation.
5,000 00, Subject to primary rate of one per cent.—$50.00.

$125,000 00, Subject to increase of one one hundred-twenty-fifth of one per cent. on primary rate for each $100.00 of such increase; that is to say, plaintiff claims that the rate on the first $100.00 of the excess over the amount subject to the primary rate would be one per cent. plus one one hundred-twenty-fifth of one per cent., or 1.008 per cent.

On the second $100, that the rate would be one per cent. plus two one hundred-twenty-fifth of one per cent., or 1.016 per cent.

On the third $100 of such increase the rate would be one per cent. plus three one hundred-twenty-fifth, or 1.024 per cent.

In other words, plaintiff claims that the rate increases under the rule of arithmetical progression; so that the rate on the last $100 of the $125,000 would be one per cent. plus one thousand two hundred and fifty one hundred-twenty-fifths of one per cent. or 11 per cent. Plaintiff claims that 1.008 per cent., the rate on the first hundred of such increase, should be added to the 11 per cent., the rate on the 1250th hundred of such increase; and the total, to wit, 12.008 per cent., divided by 2, would give the

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average rate of the tax on the $125,000; 12.008 per cent., divided by 2, equals 6.004 per cent. 6.004 per cent. of $125,000 is $7,505. The $50 tax on the $5,000 subject to the "primary rate" of one per cent., plus $7,505, makes a total tax due by Alice S. McGannon of $7,555. From this deduct 5 per cent. of $7,555, or $377.75, if paid within one year, leaving a balance to be paid of $7,177.25.

On this, a proceeding in error of the widow and heirs, it is our duty to determine which of these methods, if either, is correct.

Article 10, sec. 12, of the Constitution, provides:

"The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes."

In *Magoun v. Ill. Trust Co.*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, Justice McKenna said:

"Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over 60 years, and have been enacted in other states. They are not new in the laws of other countries. In *State v. Alston*, 94 Tenn. 674 [30 S. W. 750, 28 L. R. A. 178], Judge Wilkes gave a short history of them as follows: 'Such taxes were recognized by the Roman law. 1 Gibbon's Decline and Fall of the Roman Empire, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell's History of Taxation in England, 148; Acts 20 Geo. III, c. 28; 45 Geo. III, c. 28; 16 and 17 Vict. c. 51; *Green v. Craft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, February, 1893. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891. Chapter 25 now repealed by chapter 174, Acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883; were enacted in Virginia in 1844, repealed in 1855, re-enacted in 1863, and repealed in 1884.' Other states have also enacted them —Minnesota by constitutional provision. The constitutionality of the taxes has been declared, and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S.

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625 [16 Sup. Ct. 1073, 41 L. Ed. 287]; *Strode v. Commonwealth,* 52 Pa. 181; *Eyre v. Jacob,* 14 Grat. (Va.) 422 [73 Am. Dec. 367]; *Schoofield v. Lynchburg,* 78 Va. 366; *State v. Dalrymple,* 70 Md. 294 [17 Atl. 82, 3 L. R. A. 372]; *Clapp v. Mason,* 94 U. S. 589 [24 L. Ed. 212]; *In re Merriam's Estate,* 141 N. Y. 479 [36 N. E. 505]; *State v. Hamlin,* 86 Me. 495 [30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569]; *State v. Alston,* 94 Tenn. 674 [30 S. W. 750, 28 L. R. A. 178]; *In re Wilmerding,* 117 Cal. 281 [49 Pac. 181]; Dos Passos, Collateral Inheritance Tax, 20; *Minot v. Winthrop,* 162 Mass. 113 [38 N. E. 512, 26 L. R. A. 259]; *Gelsthorpe v. Furnell* [20 Mont. 299], 51 Pac. 267 [39 L. R. A. 170]. See, also, *Scholey v. Rew,* 23 Wall. 331 [23 L. Ed. 99]. It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: (1) An inheritance tax is not one on property, but one on the succession. (2) The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity of taxation."

Mr. Hugh Bancroft of the Massachusetts bar says in his book, "Inheritance Taxes for Investors" (1911), that only ten states and the District of Columbia have no inheritance tax law.

In *Re Wilmerding,* 117 Cal. 281, 49 Pac. 181, the court said:

"Similar statutes have been enacted in other states, and with the exception of New Hampshire, have been sustained by the courts in those states upon the ground that the charge thus imposed is in the nature of an excise tax or a tax upon the right of succession, and is within the constitutional power of the Legislature. *State v. Hamlin,* 86 Me. 495 [30 Atl. 76, 25 L. R. A. 632], 41 Am. St. Rep. 569; *Minot v. Winthrop,* 162 Mass. 113 [38 N. E. 512, 26 L. R. A. 259]; *Hoffman's Estate,* 143 N. Y. 327 [38 N. E. 311]; *Strode v. Commonwealth,* 52 Pa. 181; *State v. Dalrymple,* 70 Md. 294 [17 Atl. 82, 3 L. R. A. 372]; *Eyre v. Jacob,* 14 Grat. (Va.) 422, 73 Am. Dec. 367; *State v. Alston,* 94 Tenn. 674 [30 S. W. 750, 28 L. R. A. 178]. See, also, *United States v. Perkins,* 163 U. S. 625 [16 Sup. Ct. 1073, 41 L. Ed. 287]. * * * The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary dispositions, are en-

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tirely matters of statutory enactment, and within the control of the Legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion."

There is no question before us other than the construction of said statute as to the proper rate of taxation to be applied to the transfer of these respective inheritances. Germane to this inquiry, the statute provides:

"Sec. 7712. A tax shall be and is hereby imposed upon any transfer of any property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association, or corporation, except corporations of this state organized under its laws solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization within this state, in the following cases: * * * When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death. * * * The tax so imposed shall be upon the clear market value of such property at the rates hereinafter prescribed, and only upon the excess of the exemptions hereinafter granted.

"Sec. 7713. When the property * * * passes by any such transfer, where the amount of the property shall exceed in value the exemptions hereinafter specified, the primary rates of taxation hereinafter imposed shall apply as follows:

"On the first five thousand dollars of such excess, in class one; on the first two thousand dollars of such excess in classes two and three; on the first five hundred dollars of such excess in classes four and five, and shall be:

"Class 1. Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue, lineal ancestors of the decedent or any child adopted as such in conformity with the laws of this state, * * * at the rate of one per centum of the clear value of such interest in such property.

"Class 2. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister * * * of the decedent, a wife or widow of a son, or the husband of a

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daughter of the decedent, at the rate of one and one-half per centum of the clear value of such interest in such property.

"Class 3. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the decedent, at the rate of three per centum of the clear value of such interest in such property.

"Class 4. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother or a descendant of the brother or sister of the grandfather or grandmother of the decedent, at the rate of four per centum of the clear value of such interest in such property.

"Class 5. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the decedent, or shall be a body politic, or corporate, at the rate of five per centum of the clear value of such interest in such property.

"Sec. 7714. The foregoing rates in section 7713 are for convenience termed the primary rates. Upon all in excess of five thousand dollars, in class one, the primary rate provided for herein shall be increased one one hundred twenty-fifth of one per centum for every one hundred dollars increase in valuation of such excess. Upon all in excess of two thousand dollars, in classes two and three, the primary rate provided for herein shall be increased one-fiftieth of one per centum for every one hundred dollars increase in valuation of such excess. Upon all in excess of five hundred dollars, in classes four and five, the primary rate provided for herein shall be increased one-tenth of one per centum for every one hundred dollars increase in valuation of such excess.

"Sec. 7715. The following exemptions from the tax are hereby allowed:

"All property transferred to corporations of this state organized under its laws solely for religious, charitable or educational purposes * * * shall be exempt.

"Property of the clear value of ten thousand dollars transferred to the widow of the decedent, and five thousand dollars transferred to each of the other persons described in the first division of section 7713, shall be exempt."

Also the following exemptions are noted:

(2)	Brother or sister or their descendants, etc.	$500 00
(3)	Brother or sister of father or mother, etc.	250 00

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(4) Brother or sister of grandfather or grandmother, etc. ---------- 150 00
(5) Any other relative or stranger in blood, etc.------- 100 00

Applicable to the widow's $130,000 subject to this tax said section 7714 provides:

"The foregoing rates in section 7713 are for convenience termed the primary rates. Upon all in excess of five thousand dollars, in class one, the primary rate provided for herein shall be increased one one hundred twenty-fifth of one per centum for every one hundred dollars increase in valuation of such excess."

As one per cent. is the primary rate, and $125,000 is the widow's excess of $5,000 subject thereto, in construing this statute, the county judge increased this primary rate and applied it to each $100 unit in said excess, which produced from said sum a tax of $1,310 due the state. This was right. This would have been clearly so had the act provided, "Upon all in excess of $5,000.00, in class one, the rate provided for herein shall be increased (added to) one one hundred twenty-fifth of one per cent.," and stopped, which means the state's toll on the lump sum shall be one per cent. thereof plus one one hundred twenty-fifth of one per cent. or 1.008 per cent. So far, the sentence clearly expressed the dominant idea which must not be lost sight of and permitted to "dwindle into a squirrel's trail and run up a tree" by what follows in the same sentence, and which was intended to prescribe the detail. Having thus ascertained the rate, the tax is to be applied to what? To each $100 unit in $125,000, the total increase in valuation of the excess, or "for every $100 in increase in value of such excess." This increased rate was "for" every one of those units, which means for each and every one of them. And was "for" them in the same sense as when we say "a whip for the horse, a bridle for the ass, and a rod for the fool's back," which means, to be applied to. Thus the state told the tax gatherer, in effect, not to take the twentieth penny, as it seems the Romans did, but that "for" every $100 unit of this excess passing through his hands he should exact therefrom, not only the dollar, but a modicum besides, or 1.008 per cent. of that amount, and it seems that, should the last be not a full unit, he might say as to that *de minimus non curat lex,* but such is not the case here.

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This is no novel use of the word "for," which seems to have occasioned so much confusion in the application of this sentence. In *Knowlton v. Moore,* 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, the law under construction was similar to the one here. It taxed the legacy of $100,000 in question "at the rate of seventy-five cents for each and every $100 of the clear value of such interest in such property" to be multiplied as therein stated. The executors, construing the rate, returned it to the taxing power thus: "Rate for every $100, $2.25," which was so far held to be a correct construction of the word "for" that the same was not questioned. The syllabus in that case stated the contention of the executors to be: "(3) That a legacy of $100,000 taxed at the rate of $2.25 per $100, was only subject to the rate of $1.12½" —showing clearly that "for," as used in the sentence under construction, meant "to be applied to," and that $2.25 was to be deducted from every $100, and we shall likewise hold. We are therefore of opinion that the method of computation adopted throughout by the county judge was right, and for that reason the same is approved. This for the further reason that the method adopted by the district court, to quote again from Mr. Bancroft's book, would lead to something like this:

"Suppose a rich New York resident shows his appreciation of his best friend by naming him his executor, and leaves him, in addition, a handsome legacy of $2,000,000 worth of stock in an Oklahoma corporation. The executor is not familiar with the gyrations of inheritance tax laws, and, as he wishes to receive his dividends, he sends along the stock for transfer. Some one has borrowed our table of logarithms and our higher mathematics are a little rusty, but under this handicap we figure that $1,951,930 is a very close approximation to the Oklahoma tax on this legacy. The exhilarating feature of the situation is not that he has only $48,070 of the $2,000,000 left when Oklahoma is through, but is that a tax of $418,745 is still due on the legacy to the state of New York, and the executor is personally responsible for the payment of the entire amount."

The latter method of computation is rejected, pursuant to the well-known canon of construction stated in *Lau Ow Bew v. U. S.,* 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, thus:

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"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of Holy Trinity v. United States,* 143 U. S. 457 [12 Sup. Ct. 511, 36 L. Ed. 226]; *Henderson v. New York,* 92 U. S. 259 [23 L. Ed. 543]; *United States v. Kirby,* 74 U. S. (7 Wall.) 482 [19 L. Ed. 278]; *Oates v. First Nat. Bank of Montgomery,* 100 U. S. 239 [25 L. Ed. 580]."

And in view of the further rule, construing tax laws, that, where there is any ambiguity or doubt, it must be resolved in favor of the person upon whom it is sought to impose the burden (26 Am. & Eng. En. Law [2d Ed.] 669), or, as stated in 2 Lewis' Sutherland, Stat. Const. (2d Ed.) sec. 490:

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or injustice, to favor public convenience, and to oppose all prejudice to public interest. 'In construing an act of the General Assembly, such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the General Assembly at the time of its passage; and courts will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences, and impute to the General Assembly total ignorance of the subject with which it undertook to deal.' 2 Lewis' Sutherland, Stat. Const. (2d Ed.) sec. 490."

Neither is there merit in the contention that as article 10, sec. 19, of the Constitution provides, "Every act enacted by the Legislature * * * levying a tax, shall specify distinctly the purpose for which said tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose," and the act under construction provides that the tax when collected "shall be applied, (1) for the use of the public schools of the state, (2) for the expense of the State Government, and (3) for any other purpose which the Legislature may by law direct"—that said act is in conflict with said section of the Constitution, and that it does not specify distinctly the purpose for which the tax is levied. This, for the reason that said section of the Constitution is intended to apply only to annually recurring taxes imposed generally upon the entire property of the state, and not the kind of tax we are dealing with, which is a special tax. In *Brown, etc., Co. v. Commonwealth,* 125 Ky. 402, 101 S. W. 321,

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the court had under construction a similar constitutional provision. In that case the commissioners in the revision of the laws relating to taxation understood the section (Constitution effective in 1891, sec. 180) as not to refer to taxes of this kind, and for years thereafter the Legislature in subsequent acts passed impliedly adopted the construction of the commissioners. This led the court to adopt that construction in that case, and that, too, apparently, without further authority in support thereof. In *Re McPherson*, 104 N. Y. 315, 10 N. E. 687, 58 Am. Rep. 502, the court held:

"Const. N. Y. art. 3, sec. 20, providing that every law which imposes, continues, or revives a tax shall distinctly state the tax, and the object to which it is to be applied, does not apply to Laws N. Y. 1885, c. 483, imposing a succession tax upon legacies to persons not related to the testator; but applies only to annually recurring taxes, and taxes imposed generally upon the entire property of the state, and not to special taxes upon special or limited kinds of property."

Speaking of the tax under consideration, the court in the body of the opinion said:

"It is always uncertain upon whom it will fall and how much revenue it will produce. It would have been impossible for the Legislature, perhaps years in advance, to specify the particular objects to which the tax should be applied, and we are of opinion that this section of the Constitution was intended to apply to the annual recurring taxes known at the time of the adoption of the Constitution, and imposed generally upon the entire property of the state."

It is next contended that as Comp. Laws 1909, reads:

"Sec. 7202. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code the thing of which there may be ownership is called property."

"Sec. 7203. There may be ownership of all inanimate things which are capable of appropriation, or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, the good will of a business, trade marks and signs, and of rights created or granted by statute"

—the right of succession is thereby made property, and, as this tax is imposed on that right, it is a tax on property and hence the stat-

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ute imposing it is contrary to article 10, sec. 6, of the Constitution, in that it seeks to subject to taxation that which was exempt before, stating wherein. It seems that this is claiming too much for this statute, the first section of which is intended to be and simply is a definition, and the second a general statement declaratory of the common law. Upon a claim so slender and without further authority to support it, we are unwilling to hold contrary to the great weight of authority that this tax was thereby converted from a tax on the transitus of property, as held in *Eyre v. Jacob,* 14 Grat. (Va.) 422, 73 Am. Dec. 367, into a tax on property, and hence subject to the operation of article 10, sec. 6, *supra.* We prefer to follow the holding in that case and to hold, as we do, that, being a tax on the transitus of property, or, to use the language of the statute, on the "transfer" of the property, the Legislature was in no manner controlled by said section in the imposition of a tax of this kind. For the same reason the constitutional provision requiring equality and uniformity of property taxation was not controlling upon the Legislature in the enactment of a statute such as this. *In re Fox,* 154 Mich. 5, 117 N. W. 558. Also, *Union Trust Co. et al. v. Durfee,* 125 Mich. 487, 84 N. W. 1101, citing *Strode v. Commonwealth,* 52 Pa. 182; *Scholey v. Rew,* 23 Wall. 352, 23 L. Ed. 99; *Mager v. Grima,* 8 How. 490, 12 L. Ed. 1168; *Tyson v. State,* 28 Md. 587; *Eyre v. Jacob,* 14 Grat. (Va.) 422 [73 Am. Dec. 367]; *U. S. v. Perkins,* 163 U. S. 629, 16 Sup. Ct. 1073, 41 L. Ed. 287; *State v. Alston,* 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; *State v. Hamlin* [86 Me. 495], 30 Atl. 76, 25 L. R. A. 632 [41 Am. St. Rep. 569]; *Maryland v. Dalrymple* [70 Md. 294], 17 Atl. 82, 3 L. R. A. 372; *Knowlton v. Moore* [178 U. S. 41], 20 Sup. Ct. 750, 44 L. Ed. 969; *Magoun v. Bank,* 170 U. S. 288, 18 Sup. Ct. 594, 42 L. Ed. 1073; *Walcott v. People,* 17 Mich. 68, 83; *Youngblood v. Sexton,* 32 Mich. 413 [20 Am. Rep. 654].

There is no merit in the contention that this law is unconstitutional on the ground that it was local and special, and changes the law of descent or succession, contrary to article 5, sec. 46, of the Constitution. This precise point was raised in *Re Magnes Estate,* 32 Colo. 527, 77 Pac. 853, where the court, sustaining

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a similar provision of the Colorado Constitution (article 5, sec. 25), said:

"It is difficult to see wherein the imposition of a succession tax on property passing under the intestate laws changes the pre-existing law of descent. That law remains just as it was before. Property passes thereunder after just as it did before the tax was laid, and to precisely the same persons; and the laying of the tax merely casts upon its devolution to those persons a burden that was not borne before, but which at any time the state could impose in the form of a tax."

We are therefore of opinion that the construction of this act by the county judge was right, and that the tax should be figured as he did it and upon the basis indicated. Adopting as we do his theory of computation, the judgment of the district court is reversed and the cause remanded, with directions to proceed in accordance with this opinion.

WILLIAMS, KANE, and DUNN, JJ., concur. HAYES, J., dissents from that part of the opinion of the majority of the court which construes the statute fixing the rate of tax to be collected. Upon all other propositions considered and decided he concurs.

ATCHISON, T. & S. F. RY. CO. v. STATE *et al.*

No. 1424. Opinion Filed May 14, 1912.

(124 Pac. 56.)

CARRIERS—Regulation—Orders of Corporation Commission—Construction. Rule 6 of Order 168, imposed by the Corporation Commission, applies only to intrastate shipments.

(a) A fine on account of interstate shipments cannot be imposed under said rule upon a carrier.

(Syllabus by the Court.)

Appeal from Order of Corporation Commission.

Appeal by the Atchison, Topeka & Santa Fe Railway Company from an order of the Corporation Commission in proceedings

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commenced by J. F. McFadden. Reversed and remanded, with instructions.

Cottingham & Bledsoe, for appellant.

Charles West, Atty. Gen., and *C. J. Davenport,* Asst. Atty. Gen., for appellees.

WILLIAMS, J. This is an appeal from the order of the Corporation Commission, imposing a fine of $100 upon the appellant for failure to move an interstate shipment, as required by rule 6 of Order No. 168 of said Commission.

The Attorney General has filed the following statement in this case:

"The suggestion is made that rule 6 of Order No. 168 of the Corporation Commission contains provisions which are invalid, when applied to an interstate shipment, and that said rule is not separable, so that the valid portions, when applied to an interstate shipment, may be upheld. Rule 6 of Order No. 168 reads as follows: 'It shall be the duty of carriers to begin the forward movement of freight toward its destination within twenty-four hours (24) after the bill of lading is signed, and, after the movement thus commences, such freight shall be carried toward its destination at a rate of not less than fifty (50) miles per day covering the whole period any carrier controls the same and at junction and divisional points, twelve (12) hours additional time shall be granted; except that, in movement of perishable freight and live stock in less than ten car lots, minimum rate shall be one hundred (100) miles per day and six (6) hours additional time at junction and divisional points. Provided that agents shall advise shippers of live stock in car loads the time of arrival of the train on which same are to be moved and loading of such live stock shall be completed one (1) hour before the arrival of such train and on shipments of ten or more cars of live stock the minimum rate of movement per day shall be two hundred (200) miles, with no additional time at junction or divisional points.'

"We do not mean to concede that any portion of said rule is not a proper regulation by the Corporation Commission of railroads in the state; but the court's attention is called to the following language used in the said order: 'And after the movement thus commences, such freight shall be carried toward its destination at a rate of not less than fifty (50) miles per day *covering the whole period any carrier controls the same.* * * *'

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"For the reason that the state would have no control over the shipment beyond the limits of the state, and for the reason that the order requires a certain rate of speed during the whole period any carrier controls the same, we think this indicates the intention of the Commission that such order should apply only to intrastate shipments. It would not be presumed that the Commission would undertake to exercise an unconstitutional power to make its orders effective beyond the limits of the state, and the words used indicate the order is intended to apply only to intrastate shipments."

We agree with the Attorney General that rule 6 of Order No. 168, under which the order of the Commission imposing the fine in this case was made, does not apply to interstate shipments, and cannot be made the basis of sustaining the fine imposed.

It follows that the order of the Commission is reversed, and this cause is remanded, with instructions to set aside the order and dismiss the proceeding.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

ST. LOUIS & S. F. R. CO. v. LADD.

No. 835. Opinion Filed May 14, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 451.)

1. **CARRIERS—Contract of Shipment—Limitations.** A shipper of live stock cannot, in the absence of fraud by the carrier, avoid limitations of the carrier's liability contained in the bill of lading or shipping contract by showing that he executed the contract hurriedly, or without due care, or that he was ignorant of its contents, or failed to read the same.

2. **SAME.** By the laws in force in the territory of Oklahoma prior to statehood, a provision in a live stock contract or bill of lading to the effect that, as a condition precedent to a recovery for any damages by such contract, the shipper will give notice in writing of the claim therefor to some general officer or the nearest station agent of the carrier or to the agent at destination or to some general officer of the delivering line before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such

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notice to be served within one day after the delivery of such stock at destination, was valid.

3. **SAME—Live Stock Shipment—Notice of Injury.** Where, from the nature of the injury alleged and proved to have been inflicted upon the cattle, it must have been apparent at once upon their arrival at destination that they were seriously damaged and that there was nothing to prevent the shipper from making the necessary claim and giving the railroad company an opportunity to examine the live stock within the time and in the manner limited in the shipping contract, the question of the reasonableness of such a provision is a question of law for the court.

4. **SAME—Limitation of Liability—Waiver of Stipulations.** A stipulation limiting the liability of the carrier or fixing the time and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly.

5. **SAME—Notice of Damage—Waiver.** Where there is evidence tending to show that the freight claim agent of a common carrier receives a claim for damages to a shipment of live stock after the time limited by a clause of the shipping contract requiring notice, which has not been complied with by the shipper, has expired, treats it as pending and then rejects it on other grounds, the question of whether the carrier intends to waive the notice clause as a defense is a question of fact for the jury.

(Syllabus by the Court.)

Error from Grady County Court;
N. M. Williams, Judge.

Action by G. W. Ladd against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

W. F. Evans, R. A. Kleinschmidt, W. C. Mitchell, and *Fred E. Suits,* for plaintiff in error.

F. E. Riddle, for defendant in error.

KANE, J. This was an action by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages to a shipment of cattle shipped by the plaintiff over the defendant railway from Tuttle, Okla., to Kansas City, Mo. The petition contained two paragraphs; the first being to the effect that through the negligence of the officers, agents, and employees of the defendant the train on which said cattle were shipped was delayed and said cattle were on the road standing

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in the cars for about 50 hours longer than was necessary and beyond what was the reasonable time required for transporting and delivering said cars at Kansas City, and that thereby said cattle were injured in looks and appearance, and were caused to be in a stale and stupid condition, and to lose extra flesh to the amount of 50 pounds per head. The second paragraph was to the effect that there was a decline in the market between the day said cattle should have been in Kansas City and the day they arrived there, on account of which delay said cattle brought less on the market by reason of their condition than they would have brought had they been in the good condition they would have been in if they had been delivered within a reasonable time. The action was in form an ordinary action at law, based upon the theory that the railway company had violated its common-law duty as a common carrier in the particulars above set out. The answer of the defendant, after admitting it received the shipment of cattle, alleged, in substance, that at said time it had two rates for the transportation of live stock, to wit, a rate at carrier's risk, and a reduced rate under a contract limiting the liability of the carrier, and that plaintiff had the option of shipping said stock at either of said rates; that plaintiff elected to ship said cars of cattle at the reduced rate, and requested in writing the transportation of said cattle at such reduced rate, under the terms of the contract limiting the liability of the carrier. Then follow allegations setting up noncompliance with several of the conditions of the special contract by the plaintiff. The reply amounted to a general denial. On the trial there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It is admitted that plaintiff signed the special contract, but he contends that he did so under such circumstances as not to charge him with knowledge of its contents, and that he did not have an opportunity to exercise the option of choosing the rate under which he desired to ship. It seems that the cattle were loaded just a few moments before the departure of the train on which they were to be transported; that, immediately after they were loaded and before the shipper had time to get his bill of

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lading or sign his contract, the train crew commenced the necessary switching operations to transfer the loaded stock cars from the place they were loaded to their proper place in the train which was to carry them to their destination; that while this was going on the shipper went to the station agent, and signed the special contract referred to without reading it; that he made no inquiry whether or not the company had two rates, and the agent did not tell him that there were two rates, nor read the contract to him, nor call his particular attention to the conditions contained therein. It is also admitted that the cattle were on the road longer than the time usually necessary to transport them from Tuttle, Okla., to Kansas City, Mo., and that on their arrival at the market in Kansas City the cattle were considerably shrunken in flesh.

The rule seems to be well settled that a shipper of live stock cannot, in the absence of fraud by the carrier, avoid limitations of the carrier's liability contained in the bill of lading or shipping contract by showing that he executed the contract hurriedly, or without due care, or that he was ignorant of its contents, or failed to read the same. *Nashville, etc., R. Co. v. Stone,* 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; *Hoffman v. Metropolitan Exp. Co.,* 111 App. Div. 407, 97 N. Y. Supp. 838; *Wabash, etc., R. Co. v. Black,* 11 Ill. App. 465; *Stewart v. Cleveland, etc., R. Co.,* 21 Ind. App. 218, 52 N. E. 89; *Patterson v. Kansas City, etc., R. Co.,* 56 Mo. App. 657; *Mills v. Weir,* 82 App. Div. 396, 81 N. Y. Supp. 801; *Johnstone et al. v. Richmond, etc., R. Co.,* 39 S. C. 55, 17 S. E. 512. "As has been said by one court," says Elliott in his work on Railroads (vol. 4, sec. 1502a), "it would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentations, or mistakes, it must be presumed that he read the contract, and assented to its provisions." In the case at bar it is apparent that it was the desire of the shipper that his cattle should be forwarded on the train they did go, and that the haste

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was necessary in order that his wishes in that respect could be carried out. There is no charge of fraud on the part of the railway company or its agents in the matter, and there seems to be an entire lack of any of the other ordinary grounds for relieving a competent party from the performance of conditions contained in a contract voluntarily signed by him. The evidence shows there were in fact two tariff rates on live stock, one of them, the higher rate, at the carrier's risk, the other, the lower rate, one of limited liability. One of the sections of the special contract reads as follows:

"This application is an election on my part to avail myself of a reduced rate by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations."

And another section (section 15) is as follows:

"That in making this contract the undersigned owner, or agent of the owner, of the stock named herein, expressly acknowledges that he has had the option of moving this shipment under the tariff rate, either at carrier's risk or upon a limited liability named herein, and expressly accepts and agrees to all stipulations and conditions named herein."

If, under the doctrine heretofore adverted to, the shipper was bound by the other sections of the contract, he was also bound by the ones above quoted, and, of course, cannot repudiate them upon the ground that the terms of the contract were not called to his attention before he signed it. Having reached the conclusion that the special contract is binding upon the shipper, the question arises, Has he complied with its terms? The principal defense of the railway company is based upon an alleged failure of the plaintiff to comply with section 11 of the contract, which provides:

"That, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some General Officer or the nearest station agent of the first party, or to the agent at destination, or some General Officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at

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destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims."

It seems to be conceded that the notice required by section 11 was not given within the time limited, and it is also conceded that by the laws in force in the territory of Oklahoma at the time this cause of action arose a provision in a live stock contract or bill of lading providing for written notice of damages within a specified time is valid if such provision is reasonable. But counsel for defendant in error contends the question of reasonableness was submitted to the jury upon proper instructions from the court, and, as it is a question of fact to be decided by the jury, their finding thereon is conclusive. No doubt to sustain such a provision as a binding condition in any given case, it must appear from the circumstances which there prevail that it is just and reasonable, but the cause of action in the instant case accrued prior to statehood and there is nothing to distinguish it from *St. L. & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470, where the notice clause in a similar contract was held to be reasonable as a question of law, and in *St. L. & S. F. R. Co. v. Cake*, 25 Okla. 227, 105 Pac. 322, where this court followed the rule laid down in the Phillips case. The Cake case was also an action for damages to live stock occasioned by the negligent delay in forwarding the shipment, and seems to be in point in all particulars. From the very nature of the injuries alleged to have been inflicted upon the cattle, it must have been apparent at once upon their arrival at their destination that they were seriously damaged, and there was nothing to prevent plaintiff from making the necessary claim and give the railroad company an opportunity to examine the live stock before it was removed from their premises and mingled with other cattle.

Plaintiff contends that the railroad company waived noncompliance with the notice provision of said contract as a defense, and even if said provision is held to be reasonable, he is still entitled to recover. The evidence shows that the plaintiff, through his agent, the Kansas City Live Stock Commission Company, some

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time after the cattle were sold, and mingled with other stock, presented the claim to the freight claim agent of the railroad company, and said agent, without adverting to the failure to give the notice within the time prescribed, made some effort to adjust the claim, which effort seems to have failed for reasons other than lack of the required notice. During these negotiations the plaintiff received letters from Mr. Leith, freight claim agent of the company, as follows:

"Frisco—St. Louis & San Francisco Railroad Co. Freight Claim Department. Jul. 16, 1907. St. Louis, ———, 1907.

"Dear Sir: Your claim No. —— for S O D $441.29 on account of is received and shall have attention. If necessary to communicate with us again, please refer to claim No. Frisco System 389158. Yours truly, J. E. Leith, Freight Claim Agent. Addressed: G. W. Ladd, Chickasha, I. T. Postmark St. Louis, Mo., Jul. 16, 7 p. m., 1907."

"Frisco. St. Louis & San Francisco Railroad Co. Freight Claim Department. Jul. 16, 1907. St. Louis, ——— 190.

"Dear Sir: Your claim No. —— for S. O. D. $441.29 on account of G. W. Ladd is received and shall have attention. If necessary to communicate with us again, please refer to Claim No. 389158. Freight Claim Department, Frisco System. Yours truly, J. E. Leith, Freight Claim Agent. Addressed: Kansas City Live Stock Com. Co., Kansas City, Mo. Postmark St. Louis, Mo., July 16, 7 P. M. 1907."

"Frisco. St. Louis & San Francisco Railroad Company. Freight Claim Department. J. E. Leith, Freight Claim Agent. St. Louis, Oct. 10, 1907. No. 389158. G. W. Ladd, Chickasha, I. T.

"Dear Sir: Some time ago the Kansas City Live Stock Commission Co., filed a claim for your account for $441.29. Now, I find that while the train that was handling the two cars of cattle was in some trouble, these cars were not derailed nor damaged in any manner and the cattle was all in good shape. This is shown by their condition at Kansas City and there was no difference of 25 cents per hundred in the market; in fact, the market of the 25th is quoted steady to 10 cents lower and I believe if we pay a nickel on the railroad weight of 88400 pounds, which was the weight we collected our charges on, in addition I will allow a reasonable shrinkage and the feed of $12.00, that it will represent our liability. If you want my draft for $100.00 to settle the claim,

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please so advise and it will be properly mailed to you. Yours truly, J. E. Leith."

On the former hearing we were impressed by the reasoning in *Old Dominion S. S. Co. et al. v. Flanary & Co.*, 111 Va. 816, 69 S. E. 1107, *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30, and cases of that class, which hold that, if waiver by conduct is relied upon, it must appear that the shipper was caused to occupy a more disadvantageous position than he would have occupied but for that conduct, and held that inasmuch as the conduct upon which the waiver was based occurred after the time for giving the notice had expired and there was nothing to indicate that the carrier intended to waive its rights under the contract, or to show that the shipper was placed in any worse attitude by what was done, there was no waiver as a matter of law. On rehearing, counsel for defendant in error call our attention to authorities which convince us that there is sufficient evidence in the record tending to show an intention on the part of the railway company to waive the notice provisions of the shipping contract as a defense to take the case to the jury on that question.

Mr. Elliott, in his work on Railroads (2d Ed.) sec. 1514, states the general rule as follows:

"A stipulation limiting the liability of the carrier or fixing the time and manner of giving notice or presenting claims may be waived by the carrier impliedly, by conduct, as well as expressly. Thus where a claim is received and acted upon, after the expiration of the time limited, without any objection on that account, the carrier may be deemed to have waived the benefit of the limitation as to the time for presenting it."

A great many authorities are cited in support of the text. Hutchinson on Carriers (3d Ed.) sec. 444, cites *McFall v. Railroad Co.*, 117 Mo. App. 477, 94 S. W. 570, in support of the proposition that, "where the carrier receives a claim after the time limited for presentment has expired, treats it as pending, and then rejects it on other grounds, he will be deemed to have waived his right to notice within the time limited." The following cases seem to be to the same effect: *Blackmer & Post Pipe Co. v. M. & O. R. et al.*, 137 Mo. App. 479, 119 S. W. 1; *Harned v. Mo. Pac. Ry. Co.*, 51 Mo. App. 482; *M. & M. Transportation Co. v.*

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Eichberg et al., 109 Md. 211, 71 Atl. 993, 130 Am. St. Rep. 524; *Vencill v. Quincy, etc., R. Co.*, 132 Mo. App. 722, 112 S. W. 1030; *St. L. S. W. R. Co. v. Grayson*, 89 Ark. 154, 115 S. W. 933; *Wallace v. L. S. & M. S. R. Co.*, 133 Mich. 633, 95 N. W. 750; *Ingwersen v. St. L. & H. R. Co.*, 116 Mo. App. 139, 92 S. W. 357; *Banks v. Penn. R. Co.*, 111 Minn. 48, 126 N. W. 410; *Parsons et al. v. Lane*, 97 Minn. 98, 106 N. W. 485, 7 Ann. Cas. 1144; *Hudson & Co. v. N. P. Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550. In the latter case it was held that if by his conduct the general freight agent of the carrier induces the shipper to go to the trouble and expense of making out his claim for damage, after the expiration of the time limited, without any objection on that account, and thereby leads him to believe that its presentment would not be insisted upon within the stipulated time, the shipper's failure in that regard cannot be urged as a defense by the carrier. It is true that the plaintiff in the instant case was not induced to file his claim for damages by the conduct of the defendant, but he may very well have been induced by the statements of the claim agent to employ counsel and go to the expense of this litigation, upon the theory that the company would rely as a defense to the action upon the grounds stated in the correspondence, which undoubtedly were the ones upon which the claim was rejected. See, also, *Chicago, R. I. & P. Ry. Co. v. Spears*, 31 Okla. 469, 122 Pac. 228. A great many of the courts cite insurance cases as applicable to cases of this kind, among which may be mentioned *Illinois Cent. R. Co. v. Bogard et al.*, 78 Miss. 11, 27 South. 879; *Lasky v. So. Exp. Co.*, 92 Miss. 268, 45 South. 869; *Bushnell v. Wabash R. Co.*, 118 Mo. App. 618, 94 S. W. 1001. If insurance cases are in point, and we know no reason why they are not, a great many additional authorities might be cited in support of the conclusion reached. One case, however, will be sufficient to illustrate the general trend. In *Northern Assurance Co. v. Grand View Bldg. Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, the court said:

"The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken.

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They were inserted for its benefit, and it depended upon its pleasure whether they should be enforced."

It is admitted by counsel for plaintiff in error that any damage which may have accrued by reason of a decline in the market does not fall within the purview of the notice provision of the contract.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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*BRADY v. SIZEMORE *et al.*

No. 1030. Opinion Filed May 14, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 615.)

1. **INDIANS—Lands—Inheritance.** Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment or a certificate of selection therefor, **held,** that he died seised of no estate of inheritance therein.

2. **SAME.** Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment for which on August 23, 1902, certificate of selection issued to his heirs, **held,** that chapter 49 of Mansf. Dig. of Ark. (Ind T. Ann. St. 1899, secs. 1820-1843) governs the devolution of the allotment, as provided by the Indian Appropriation Act of May 27, 1902 (32 St. at L. 258, c. 888), and section 6 of an act of Congress approved June 30, 1902, ratified July 26, 1902 (32 St. at L. 500, c. 1323), known as the Creek Supplemental Agreement, to be applied as if deceased had received title to his allotment and died seised thereof.

(Syllabus by the Court.)

Error from District Court, Wagoner County; John H. King, Judge.

Action by Foil M. Brady against William Sizemore and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

*Appealed to the United States Supreme Court.

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John R. Thomas and *Grant Foreman,* for plaintiff in error.

W. D. Halfhill, for defendants in error.

TURNER, C. J. On December 8, 1905, plaintiff in error, Foil M. Brady, alleging himself to be the sole heir at law of Ellis Grayson, a deceased citizen of the Creek Nation, sued William Sizemore and Jeannetta Newberry, defendants in error, who claimed to be his sole heirs, in the United States Court for the Northern District of Indian Territory, sitting at Wagoner, to determine the question of heirship and which of the two contending parties was entitled to the allotment of said deceased. After reference to the master, there was trial to the court and judgment for defendants, and plaintiff brings the case here. The facts are: That Ellis Grayson, a duly enrolled citizen of the Creek Nation and, as such, entitled to an allotment, died intestate March 1, 1901, leaving surviving him neither child nor children nor their descendants, nor father nor mother, nor brother nor sister; but leaving surviving him plaintiff in error, the son of an aunt on the paternal side, and defendants in error, the children of an aunt on the maternal side; all three claimants being first cousins of the deceased. That on August 23, 1902, the Commission to the Five Civilized Tribes issued to the heirs of said Grayson a "certificate of selection" for the N. W. ¼ of the S. W. ¼ of section 13, township 17 N., range 17 E., and the S. E. ¼ of the N. W. ¼ and lots 1 and 2 of section 19, township 17 N., range 18 E., containing 163.60 acres. That on June 13, 1905, the Principal Chief of the Creek Nation delivered to plaintiff, as the heir at law of said Grayson, patents therefor which had been approved by the Secretary of the Interior and were thereafter duly recorded.

It is insisted for Brady, herein called plaintiff, that chapter 49 of Mansf. Dig. of Ark. (Ind. T. Ann. St. 1899, c. 21) is the governing statute and determines devolution, and that he, as the sole heir of the allottee, is entitled to the whole allotment. On the other hand, by defendants in error, herein called defendants, it is contended that the Creek law of descent and distribution determines the devolution, and that they, who are brother and sister,

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are his "nearest relation," and as such the sole heirs of the allottee and entitled to his allotment in equal moieties. The trial court took this view, but therein was error. Having died on March 1, 1901, after enrollment (under the Curtis Act) and before receiving his allotment, it might seem, as contended, that the devolution of his allotment is governed by section 28 of the Original Agreement ratified May 25, 1901, which reads:

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly." (Act March 1, 1901, c. 676, 31 St. at L. 870.)

—and that such would be in keeping with *Sanders v. Sanders et al.*, 28 Okla. 59, 117 Pac. 338. Not so. In that case where a duly enrolled citizen of the Creek Nation was in possession of and had filed upon her allotment pursuant to the Curtis Act approved June 28, 1898 (Act June 28, 1898, c. 517, 30 St. at L. 495), and died April 28, 1900, without receiving her certificate of allotment, we held that she died seised of no inheritable estate, and that her certificate having issued May 24, 1901, or prior to the ratification of the Supplemental Agreement, said allotment descended according to the laws of descent and distribution of the Creek Nation. And we might so hold here, but for the fact that not only at the time said act was ratified, no selection of his allotment having been made, Grayson died seised of no inheritable estate or vested right in said allotment, and therefore had no allotment upon which said section 28 could operate, but for the further fact, not appearing in the Sanders case, that such was true until August 23, 1902, which was after ratification of the Supplemental Agreement, when his allotment was selected and certificate of selection therefor, on said date, issued to his heirs.

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Then, and not until then, did any law of descent and distribution take hold of the then created *res* and determine its devolution.

Whether the Indian appropriation act passed by Congress May 27, 1902 (Act May 27, 1902, c. 888, 32 St. at L. 258), which took effect by virtue of a joint resolution July 1, 1902, repealed the provisions of said Original Agreement in so far as it provided for descent and distribution according to the Creek law and substituted therefor chapter 49 of Mansf. Dig. of Ark., we need not say, for, if not, section 6 of the Supplemental Agreement approved June 30, 1902, ratified July 26, 1902 (Act June 30, 1902, c. 1323, 32 St. at L. 500), did that very thing. Section 6 of said Supplemental Agreement provides:

"The provisions of the act of Congress approved March 1, 1901 (31 St. at L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansf. Dig. of Ark., now in force in Indian Territory * * *"

—which said chapter 49, being the law of descent and distribution in force at the date of the allottee's certificate, we hold to be the governing statute here; the same to be applied as if the deceased had received title to his allotment and died seised thereof. *Barnett et al. v. Way et al.*, 29 Okla. 780, 119 Pac. 418.

This is in keeping with what we held in *Hooks et al. v. Kennard et al.*, 28 Okla. 457, 114 Pac. 744. There the three allottees, whose estates were involved, were enrolled under section 28 of the Original Agreement ratified May 25, 1901, and lands were allotted to them and in their names prior to said Supplemental Agreement. One died prior to the ratification of the Supplemental Agreement—patents thereafter issued. On this state of facts, the question was: Which law governed the devolution of the estate, the law in force at the date of their certificates, or the law in force at the date of their patents? The court held the same to be the former, which was the Creek law, directed to apply by section 28 of the Original Agreement. This for the reason, we take it, that upon the issuance of certificates and not before, did there come into being an estate capable of descending,

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and that then said section for the first time had a subject-matter upon which to operate. What we would hold if, prior to the ratification of said Supplemental Agreement and the consequent operation of said section 6, which in terms repealed the provisions of the Original Agreement in so far as the same provided for descent and distribution of the Creek Nation and substituted therefor the laws of descent and distribution contained in chapter 49 of Mansf. Dig. of Ark., rights had vested in virtue of that part of the act repealed, we need not state. It is sufficient to say that no such question is here presented, and no rights having thus accrued, Congress, prior thereto, had a right to change the legislative intent and make other provision regarding those allotments, which it did by enacting section 6, changing the course of their devolution, and provide, in effect, as it did that the laws of Arkansas should thereto apply instead of the laws of the Creek Nation.

Having held that the laws of Arkansas, *supra*, govern the devolution, there being no question of Brady's right to take thereunder, the judgment of the trial court is reversed and remanded, with directions to enter judgment in accordance with this opinion.

All the Justices concur.

HINE v. WADLINGTON *et al.*

No. 1144. Opinion Filed May 14, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 299.)

1. **TELEGRAPHS AND TELEPHONES — Regulations — Orders of Corporation Commission.** On complaint of W. to the Corporation Commission on October 17, 1908, it being shown that appellant charged certain subscribers of the Purcell Telephone Exchange $1 per month for residence phones and $2 per month for business phones and other subscribers $1.25 per month for residence phones and $2.50 per month for business phones, the commission ordered that appellant discontinue the charge of $1.25 for residence phones and $2.50 for business phones to certain subscribers, and that all subscribers be charged at the same rate. **Held,** without error.

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2. **SAME—Appeal.** Subsequently, to wit, on November 10th, appellant applied to the commission for permission to raise said rates. After a hearing on April 16, 1909, the commission denied appellant's petition. Appellant then prayed this court that the record of the second proceeding be required to be certified by the commission to this court to be considered on the hearing of the appeal from the order of October 17, 1908, which was granted, but no appeal or proceeding in error was ever prosecuted from the order entered after April 16, 1909. **Held,** that this court is without jurisdiction to review said order of April 16, 1909.

(Syllabus by the Court.)

Appeal from Corporation Commission.

Proceedings before the Corporation Commission by B. C. Wadlington and others against Lewis T. Hine, sole owner of the Purcell-Lexington Telephone Company. From the order of the Commission, Hine appeals. Affirmed.

J. W. Hocker, for appellant.

Chas. L. Moore, Asst. Atty. Gen., for appellees.

WILLIAMS, J. On the 27th day of October, A. D. 1908, on petition of B. C. Wadlington and others, an order was entered by the Corporation Commission fixing and establishing rates of charges for messages and rentals of phones per month in the city of Purcell.

On October 16, 1909, petition in error, with record attached, was filed in this court to review said order; said petition in error being in part as follows:

"Comes now Lewis T. Hine, plaintiff in error, and alleges and shows to the court that on the 17th day of October, A. D. 1908, said defendant in error, B. C. Wadlington, obtained an order and judgment before the Corporation Commission of the state of Oklahoma, in an order fixing and establishing the rate charge and rentals for telephones per month in the city of Purcell, Oklahoma, in an action then pending before said Corporation Commission, wherein said defendant in error was the complainant and this plaintiff in error was the respondent. * * * Wherefore plaintiff in error prays the court that said judgment and proceedings be considered, and upon a hearing that the same be set aside and reversed, and pending a determination in this honorable court that said rates be enjoined, with such supersedeas bond as the court may order in the premises."

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On November 10, 1908, the appellant filed a petition before the Corporation Commission in substance alleging that the rates prescribed for the appellant to charge for the service rendered by this telephone exchange on October 17, 1908, were confiscatory and not remunerative, and asked that he be permitted to charge rates in excess of said order appealed from. Evidence was heard on said application on March 11, 1909, when such hearing was continued to April 16, 1909, then additional evidence being taken and his petition to increase the rates denied. See *Hine v. Wadlington et al.*, 27 Okla. 285, 111 Pac. 543; *Id.*, 26 Okla. 389, 109 Pac. 301.

The order entered on October 17, 1908, is in part as follows:

"Therefore the commission is clearly of the opinion that the undisputed facts as developed by the evidence in this case clearly show discrimination between the patrons of the defendant's telephone system, and therefore should be discontinued. It is therefore ordered by the Corporation Commission that the Purcell & Lexington Telephone Company charge all its subscribers for business telephones and residence telephones the same rate for a service which shall be, until further ordered by the commission, $1 per month for residence phones and $2 per month for a business telephone. That in the event these prices are not remunerative, the defendant company may apply to the commission to be permitted to charge additional rates and, upon such application, a thorough investigation will be made as to the reasonableness and compensatory features of these rates."

On this hearing it was shown that the appellant charged certain subscribers at the rate of $1 and $2 per month, respectively, for residence and business phones, and other subscribers $1.25 and $2.50 per month, respectively, for residence and business phones. The commission found that this was an unreasonable and an unjust discrimination and not permissible.

In *State of Alabama ex rel. C. W. Ferguson v. Birmingham Waterworks Co.*, 164 Ala. 586, 51 South. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951, it is said:

"The granting of a rate to any considerable number of consumers more favorable to them than the rate fixed for consumers generally, in the absence of possible peculiar circumstances of justification, would be evidential that the general rate is unreasonably high, which would call for municipal or legislative re-

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vision to be enacted in a due observance of constitutional limitations."

As a general proposition it is settled that a corporation authorized to supply water or light to the inhabitants of a municipality may not discriminate as to the rate charged, at least among those of the same class. *Danville v. Danville Water Co.,* 180 Ill. 235, 54 N. E. 224; *State ex rel. Latshaw v. Water & Light Com'rs,* 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; *Griffin v. Goldsboro Water Co.,* 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Armour Packing Co. v. Edison Electric Illuminating Co.,* 115 App. Div. 51, 100 N. Y. Supp. 605; *Cincinnati, H. & D. R. Co. v. Bowling Green,* 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422.

In *Owensboro Gaslight Co. v. Hildebrand,* 19 Ky. Law Rep. 983, 42 S. W. 351, it is said:

"They are quasi public corporations and practically have a monopoly of the business of manufacturing and furnishing gas within the corporate limits of the city; it is therefore their duty to furnish the city's inhabitants with gas and to do so upon terms and conditions common to all, and without discrimination. They cannot fix a variety of prices or impose different terms and conditions according to their caprice or whim."

Under the record at the hearing on October 17, 1908, no evidence was offered by the appellant to show that the rates of $1 and $2 per month for residence and business phones, respectively, were so low as to be unreasonable and unjust. The appellant having voluntarily placed such rates in force, and having operated thereunder a considerable length of time, the presumption is in favor of such rates and the burden on the hearing would be upon the appellant to show that such rates were so low as to be unreasonable and unjust. On the hearing he failed to meet this burden of proof, and the commission was justified in finding that there existed a "discrimination between patrons" of the appellant's telephone system and in ordering same to be discontinued. The order of the commission appealed from is presumed on review here to be just and reasonable.

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In *Atchison, T. & S. F. R. Co. v. State et al.*, 23 Okla. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908, paragraph 3 of the syllabus is as follows:

"Corporation Commission — Regulation of Carriers — Presumptions in Favor of. *Prima facie* just, reasonable, and correct, in section 22, art. 9 (section 235, Bunn's Ed.; Snyder's Ed. p. 259), of the Constitution, is a presumption arising upon the finding of the Corporation Commission that the order based upon such facts is presumed on appeal to this court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record as weighed and found by this court on reviewing the same."

This rule has been uniformly adhered to.

Thereafter on the 10th day of November, 1908, the appellant having filed his petition to be permitted to raise the rates, which was denied by the commission on April 16, 1909, no appeal was prosecuted from this order. Therefore this court has no jurisdiction to review the case.

It follows that the order of the Corporation Commission entered on October 17, 1908, must be affirmed, and that this court is without jurisdiction to review the subsequent order which was entered by the Corporation Commission after the 16th day of April, 1909.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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ST. PAUL FIRE & MARINE INS. CO. v. GRIFFIN.

No. 1487. Opinion Filed March 12, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 300.)

1. **JUSTICES OF THE PEACE — Procedure — Judgment — Appeal Bond.** Where the justice fails to render judgment on or before the fourth day after the close of the trial, contrary to Wilson's Rev. & Ann. St. 1903, sec. 5039, **held** error, but that the same could not affect the right of plaintiff to perfect his appeal therefrom by filing his appeal bond in the county court within ten days from the date of the judgment when rendered.

2. **APPEAL AND ERROR—Pleading—Amendment to Conform to Evidence.** Where, in a suit to recover for a partial loss on a hail insurance policy, plaintiff pleads performance of all conditions precedent to a recovery and defendant specifically denies the same, as provided by Comp. Laws 1909, sec. 5662, and where, on trial in the county court, without pleading the same, plaintiff, over objection, makes ineffectual effort to prove a waiver of one of said conditions, and where, pending proof of waiver, defendant introduces in evidence facts sufficient to constitute a waiver, **held,** that plaintiff's petition is amended so as to conform to the facts thus proved, thus putting in issue a waiver based upon those facts, with sufficient evidence to send that issue to the jury.

3. **INSURANCE—Proofs of Loss—Waiver.** Where in attempting to comply with a clause in an insurance policy, in effect providing that the insured shall within 60 days after loss make proof of same to the insurance company, and that a failure so to do within that time shall cause a forfeiture of any claim under such policy, and where plaintiff, within that time, furnished defendant certain affidavits intended as such proof, but which was not a substantial compliance with the terms of the policy, but was fatally defective, **held,** that said stipulation is waived where defendant received and retained said proofs without specific objection to any defects therein.

(Syllabus by the Court.)

Error from Grady County Court;
N. M. Williams, Judge.

Action by Ed Griffin against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiff, defendant brings error. Affirmed.

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Bond & Melton, for plaintiff in error.

F. E. Riddle, for defendant in error.

TURNER, C. J. On October 23, 1908, Ed Griffin, defendant in error, sued the St. Paul & Marine Insurance Company, plaintiff in error, before a justice of the peace at Chickasha, to recover for a partial loss sustained to a growing crop of cotton, on account of damage by hail, covered by an insurance policy issued to him by said company. There was trial to the court, after which the justice entered the following judgment:

"On this the 29th day of December, 1908, the above-styled and entitled cause came on for hearing; plaintiff and defendant appearing in person and by attorneys and both announced ready for trial. A jury being waived in this cause, same was submitted to the court, and the court after having heard the testimony introduced by the plaintiff and the defendant, and after having heard the arguments in said cause on said day, the same was by the court passed until the 30th day of December, 1908, for further argument. Thereupon both plaintiff's and defendant's attorneys appeared and argued said cause, and the court, after having heard the argument of counsel, is of the opinion that the plaintiff should take nothing by this action, and that the defendant recover costs. Now, therefore, it is hereby by this court considered, ordered, adjudged, and decreed that the plaintiff, Ed Griffin, take nothing by this action, and that the defendant herein have his costs. Witness my hand this the 5th day of January, 1909.

"T. P. MOORE, J. P."

After motion for a new trial filed and overruled, on January 11, 1909, plaintiff filed and there was approved an appeal bond, which on January 20, 1909, together with the other papers in the cause, was filed in the county court. On April 29, 1909, defendant moved said court to dismiss said appeal for want of jurisdiction, which was overruled, and exceptions saved. After answer filed there was trial to a jury and judgment for plaintiff for $62.50 and defendant brings the case here.

In support of the contention that the county court erred in refusing to dismiss plaintiff's appeal, it is urged that as said entry discloses that judgment was rendered on December 30th, and entered on January 5th, but that no appeal bond was filed until January 11th, the same was not filed within ten days, as re-

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quired by Wilson's Rev. & Ann. St. 1903, sec. 5045, and hence said court acquired no jurisdiction of the cause. Not so. It cannot be said that said entry discloses that judgment was rendered on the date assumed. All that is thereby fairly disclosed is that on January 5th, reciting past events, said cause came on to be heard on December 29th, and was passed for further argument until the 30th, and that on said day, after the argument had closed, the justice took the case under advisement, and did not make up his mind until on January 5th, the date of the judgment entry, when he recites that he "is of the opinion that the plaintiff should take nothing, * * *" showing that judgment was not only entered, but rendered, on that date. Of course, to so withhold judgment was in violation of section 5039, Wilson's Rev. & Ann. St. 1903 (*Stewart v. Waite*, 19 Kan. 218), and error, but the same could not affect the right of plaintiff to file his appeal bond within ten days from the date of the judgment when rendered, which he did, pursuant to said statute (section 5045, Wilson's Rev. & Ann. St. 1903), thereby vesting the county court with jurisdiction of the cause.

At the close of plaintiff's testimony, defendant demurred to the evidence, which was overruled, and no further testimony introduced. This action of the court is assigned for error. In his bill of particulars plaintiff alleged, among other things, that he had performed all the conditions precedent in the policy necessary to a recovery. For answer defendant made general denial, and specifically denied that plaintiff had complied with those conditions. Assuming the burden of proof of loss within 60 days plaintiff, in making out a *prima facie* case, which he did, proved that his loss occurred on July 13, 1908, and that on August 1st and 15th he had furnished defendant with certain affidavits intended as such proof of loss. Concerning this attempt it is sufficient to say that it discloses an honest, humble but ineffectual effort to comply, but not a substantial compliance with the terms of the policy, and for reasons not necessary to state was fatally defective. Of similar stipulations in *St. Paul Fire & Marine Ins. Co. v. Mittendorf et al.*, 24 Okla. 651, 104 Pac. 354, 28 L. R. A. (N.

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S.) 651, quoting approvingly from *N. W. Ins. Co. v. Atkins,* 66 Ky. 328, 96 Am. Dec. 239, we said:

"The stipulation referred to, providing for the production of preliminary evidence of loss as a condition precedent to the payment of such loss by the insurer, is not unusual in insurance policies; and it may be regarded as authoritatively settled that a substantial compliance with such a condition must be made by the claimant before a right of action will accrue to him for losses, unless the right to insist on such preliminary condition be waived. Angell on Fire Ins. secs. 223-248; Phillips on Insurance, p. 497; *Columbian Ins. Co. of Alexander v. Lawrence,* 10 Pet. 509, 9 L. Ed. 512; *Smith, etc., v. Haverhill Mutual Fire Ins. Co.,* 1 Allen (Mass.) 297, 79 Am. Dec. 733"

—citing *Home Ins. Co. v. Cohen,* 61 Va. 312; *Rochester Loan & Banking Co. et al. v. Liberty, etc., Ins. Co.,* 44 Neb. 537, 62 N. W. 877, 48 Am. St. Rep. 745; *Edward F. Boyle et al. v. Hamburg, etc., Ins. Co.,* 169 Pa. 349, 32 Atl. 553; *Georgia Home Ins. Co. v. Goode & Co.,* 95 Va. 751, 30 S. E. 366; *Swoffard Bros. Dry Goods Co. v. Amer. Cent. Ins. Co.,* 76 Mo. App. 27; *Bartlett v. Union M. F. Ins. Co.,* 46 Me. 500; *Norton et al. v. Rensellaer, etc., Ins. Co.,* 7 Cow. (N. Y.) 645; *Mary E. Erwin v. Springfield, etc., Ins. Co.,* 24 Mo. App. 145.

At this point, not having pleaded a waiver, had plaintiff rested, he could not recover; but he went further, and in attempting to show waiver, over objection, introduced certain testimony wholly insufficient for that purpose. On cross-examination of plaintiff, however, defendant drew out of him a letter and introduced it in evidence, and proved the same to have been received in answer to his attempt to furnish such proof. It reads:

"August 18th, 1908. Ed Griffin, Fletcher, Oklahoma—Dear Sir: We are in receipt of your letter of recent date enclosing affidavit. This affidavit is insufficient as a proof of loss, if you so intend it, and we therefore hold the same subject to your further orders. Yours very truly, Van Arsdale & Osborne."

And later, while plaintiff was still attempting to prove a waiver, in that defendant had theretofore sent an adjuster to adjust the loss in question, insisted that plaintiff introduce and read in evidence, which he did, a letter referring to a loss which occurred in the same field at the same time, and which, at the same

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time, had been viewed for settlement by the adjuster of the company. Said letter reads:

"Wichita, Kansas. July 31, 1908. Mr. Joel Coffey, Fletcher, Oklahoma—Dear Sir: Our Mr. Van Arsdale called at your place on the 29th inst., when you were away from home, for the purpose of adjusting your hail loss. After a careful examination, he allowed you a claim of 10 per cent., or $45.00. Mr. Van Arsdale writes that he allowed your neighbor, Mr. Maveney, 15 per cent. but that there was considerable difference in the damage done. We inclose herewith proof of loss, which you will please sign on the inside on the line marked, 'claimant,' also draft, which please endorse on the back. Kindly return these to us promptly, and we will send you your cancelled note of $31.50 and our check for the difference, in full settlement of this loss. Trusting this will be satisfactory, we are, Very truly yours, Van Arsdale & Osborne Bkgs. Co. W. C. Van Arsdale, Pres."

Having been introduced in evidence, without objection, said letter of August 18, 1908, alone, in that it established that defendant had received proof of loss without indicating any defect therein, was proof of waiver of all objections thereto, and plaintiff's petition was properly considered amended so as to conform to the facts thus proved (*Kaufman v. Boismier,* 25 Okla. 252, 105 Pac. 326; *Hartford, etc., Ins. Co. v. Warbritton,* 66 Kan. 93, 71 Pac. 278), thus putting in issue a waiver based upon those facts, with sufficient evidence to take that issue to the jury. That receiving and retaining proof of loss without specific objection thereto is a waiver of any objection to such proof is too well settled to merit citation. 19 Cyc. 863, is to the effect that, if the company intends to insist on defects, it should point out what defects it intends to rely upon in order that they may be obviated, and that a mere indefinite objection, as indicated by said letter, is not sufficient, citing abundant authority. 4 Cooley's Brief on the Law of Ins. 3549. *Wilson v. Northwestern Mutual Association,* 53 Minn. 470, 55 N. W. 626, was a suit by plaintiff's administrator on an accident policy. After the death of insured and before the appointment of said administrator, proof of loss was made by one Jones on a blank form of claim received from defendant. After furnishing same to defendant, no further proof was demanded. Defendant pleaded in defense insufficiency of the proof

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of loss. On appeal the Supreme Court held that defendant could not be allowed to defeat a recovery on the ground that it was incumbent on plaintiff himself to furnish such proof. The court said:

"It is analogous to the reception and retention of defective proof of a claim. In such cases good faith would require that the association give notice indicating the defect; and the failure to object to defective proofs, or a refusal to pay on other grounds, is regarded as an acceptance of the defective proofs, and a waiver of defects. *American Life Ins. Co. v. Mahone,* 56 Miss. 180; *Miller v. Eagle Life & Health Ins. Co.,* 2 E. D. Smith (N. Y.) 268; *Continental Life Ins. Co. v. Rogers,* 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810."

There is no merit in the contention that a waiver was impossible under the terms of this policy, which provides:

"No denial of liability or other act on the part of the company shall be deemed to waive or dispense with the furnishing of such proof"

—for the reason that in *St. Paul, etc., Co. v. Mountain Park Stock Farm Co.,* 23 Okla. 79, 99 Pac. 647, we passed on this provision, and held adversely to defendant's contention, and we adhere to that opinion.

In further support of the contention that the court erred in overruling defendant's demurrer to the evidence, it is next urged, in effect, that the policy is void for the reason that the evidence is clear that plaintiff was not the sole owner of the property when it was insured or at the time of the loss as he had represented himself to be in his statement to defendant upon which the policy issued. To avoid liability the terms of the policy are invoked which read:

"That this policy is issued on the statements made in the application for insurance made by the assured and that in case any of the statements therein made are untrue, this policy shall be null and void. * * * That every policy issued upon application of any party not legally authorized to effect insurance of the property therein insured, or of any party who has not an insurable interest in said property, as stated in his application, to the full amount insured, shall be void and of no effect."

There seems to be no merit in this contention, for the reason that the application containing the statement referred to is not in

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evidence, nor anything that tends to prove that plaintiff ever stated to defendant that he was the sole owner of the cotton and, if he had, we are not prepared to say such statement would have been false for the reason that the policy was issued on May 3d, at which time the property insured was a crop growing on land owned by another for which plaintiff was to pay in rent one-fourth of the cotton when gathered. Besides, the policy being written, "On interest in 25 acres of cotton" on certain land, showed clearly that defendant was fully apprised of the facts. For the reason that the court on the probative force of the letter of August 18th, *supra,* would have done right to instruct peremptorily for the plaintiff on the question of waiver, the error, if any, in the instruction under the fifth assignment, submitting the question to the jury on other grounds, is harmless.

As the other instruction under this same assignment correctly states the law as held, *supra,* and there is no merit in the instruction complained of under the fourth assignment, the judgment of the trial court is affirmed.

All the Justices concur.

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*SIMMONS *et al.* v. MULLEN.

No. 1535. Opinion Filed March 12, 1912.

(122 Pac. 518.)

INDIANS—Allotments—Exemptions. The exemption of lands, allotted under an act approved July 1, 1902 (Act July 1, 1902, c. 1362, 32 St. at L. 641), known as the Supplemental Agreement between the Choctaw and Chickasaw Nations and the United States, from any "debt * * * contracted prior to the time at which said land may be alienated," does not exempt them from liabilities for the torts of the allottee perpetrated prior to the allotment.

(Syllabus by the Court.)

Error from District Court, Johnston County; A. T. West, Judge.

*Appealed to the United States Supreme Court.

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Action by L. V. Mullen against N. H. Simmons and others. Judgment for plaintiff, and defendants bring error. Reversed.

L. S. Dolman, for plaintiffs in error.

Ledbetter & Moore, for defendant in error.

TURNER, C. J. On November 26, 1910, L. V. Mullen, defendant in error, sued N. H. Simmons, as sheriff of Johnston county, in the district court of said county. The petition substantially states that plaintiff is the owner of a certain tract of land (describing it) conveyed to him from F. A. Bonner by warranty deed October 12, 1908, duly filed for record; that said Bonner is a citizen of the Choctaw Tribe of one-sixteenth degree of Indian blood; that said land was his allotment as a member of said tribe, which he, on said day, had the unrestricted right to sell; that defendant as sheriff aforesaid had levied an execution on said land issued on a judgment in the case of Millord F. Ham *et al.* v. F. A. Bonner, theretofore pending in the United States Court for the Southern Judicial District of Indian Territory, sitting at Ardmore; that said judgment was rendered and the debt thereby evidenced contracted more than five years prior to the date of said execution, and at a time when said lands were inalienable and exempt from the operation of said judgment and could not be sold under execution issued thereon; that said sheriff had wrongfully levied upon and advertised said land for sale, and would sell the same to satisfy said execution, and give a deed therefor, and thereby cast a cloud upon his title unless restrained. He prayed that such be, and the same was, done by the temporary restraining order. For answer defendant admitted the citizenship of said Bonner to be as stated, justified under the writ which was dated October 1, 1908, alleged that the land was subject to levy and sale thereunder, that plaintiffs to said judgment were necessary parties, and prayed that they be brought in and the restraining order dissolved. Thereafter came Millord F. Ham and others, plaintiffs in said judgment, and by leave filed their interplea, which substantially states that on January 31, 1901, they recovered judgment in the United States Court

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for the Southern Judicial District of Indian Territory, sitting at Ardmore, against Frank Bonner in tort for some $3,000; that execution issued thereon and was levied as set forth in plaintiff's petition; that on February 23, 1906, said Bonner, a Choctaw of one-sixteenth Indian blood, became the owner of said land by allotment, whereupon said judgment became and is a lien upon said land, and was a lien thereupon at the time he sold the same to plaintiff, who took the same with full knowledge of said judgment and levy of their execution. They prayed that said lien be foreclosed and said land sold to satisfy said judgment, interplea, and cost, and for general relief. The precise question raised by plaintiff's demurrer, which was sustained, to the answer and interplea, is whether this allotment is exempt from execution on a judgment for tort. The trial court held that it was. This was error. Interpleader's judgment was obtained January 31, 1901. Bonner was allotted pursuant to the provisions of an act approved July 1, 1902, known as the Supplemental Agreement between the Choctaw and Chickasaw Nations and the United States. Section 15 of said act reads:

"Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

As the act of Congress of May 27, 1908 (Act May 27, 1908, c. 199, 35 St. at L. 312), removed restrictions upon the alienation of this allotment, and the judgment sought to be enforced against it was obtained prior thereto, it is plaintiff's contention that said judgment constituted a "debt * * * contracted prior to the time at which said land may be alienated" within the contemplation of said act. Not so. A judgment in damages for tort is not a "debt contracted" within such contemplation. This was our holding in *Shelby v. Zeigler,* 22 Okla. 799, 98 Pac. 989. In that case plaintiff obtained judgment against defendant in damages for tort after the receiver's final certificate had issued to him pursuant to act of Congress May 20, 1862 (U. S. Comp. St. 1901, p. 1398). Prior to execution on the judgment, and in fraud of plain-

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tiffs' rights, defendant conveyed the land. In passing upon the question of whether the same was subject to execution in satisfaction of said judgment the court said:

"Rev. St. U. S. c. 5, sec. 2296 (U. S. Comp. St. 1901, p. 1398), provides: 'No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor.' The question presented by this record is whether or not a tort committed, independent of any contract, for which an action would lie at common law for the recovery of damages, but would abate with the death of the aggrieved party, is such a liability as was contemplated, and within the purview of the term 'any debt contracted.'"

And, after quoting liberally and with approval from numerous authorities, held, in effect, that a judgment in damages for tort, while perhaps a liability, was not a "debt contracted" within the contemplation of that part of the act under construction; and in the syllabus said:

"After the receiver's final receipt or certificate has been issued, the homestead, under Act Congress May 20, 1862, c. 75, sec. 4, 12 St. at L. 393, Rev. St. U. S. c. 5, sec. 2296 (U. S. Comp. St. 1901, p. 1398), is not exempt as against an execution, or other proceedings on a judgment for tort, independent of any contract, rendered on a date subsequent to the issuance and delivery of such receipt or certificate."

In *Brun v. Mann*, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154, Judge Sanborn, Circuit Judge, speaking for the court, said:

"The real controversy between the parties to this suit is whether or not the lands patented to Tillett in 1892 are exempt from liability to pay the judgment in favor of Mann, which is founded on Tillett's wrongful taking and conversion of the plaintiff's cattle in 1881. The acts of Congress under which Tillett secured the lands provided that no land acquired thereunder shall be liable for the satisfaction of any 'debt contracted prior to the issuance' in the one case of the patent (2 U. S. Comp. St. 1901, p. 1398, sec. 2296; Act May 20, 1862, c. 75, sec. 4, 12 St. at L. 393), and in the other of the final certificate thereunder (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, 29 St. at L. 43 [U. S. Comp. St. 1901, p. 1537]; Act June 14, 1878, c. 190, sec. 4, 20 St. at L. 113, 114). The complainant insists that

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his claim is not a debt contracted by Tillett, but that it is a liability incurred by him for a wrong, and hence that the land is not exempt from the payment of his claim. The defendants challenge this contention, and claim the exemption of the lands and the water rights appertaining thereto. If this issue be decided in favor of the complainant, he will be entitled to a sale of the lands, and, if it be determined in favor of the defendants, the lands are free from the complainant's claim. * * * The acts of Congress declare that no lands acquired under the homestead and timber culture laws shall be liable for the satisfaction of any 'debt contracted prior' to their acquisition from the government. 2 U. S. Comp. St. 1901, p. 1398, sec. 2296; Act May 20, 1862, c. 75, sec. 4, 12 St. at L. 393; 2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, 29 St. at L. 43 (U. S. Comp. St. 1901, p. 1537); Act June 14, 1878, c. 190, sec. 4, 20 St. at L. 113, 114. Tillett acquired these lands under these statutes. He unlawfully took and converted Mann's cattle before he acquired them. He never contracted, or agreed or consented, to pay for the cattle. The question is: Are lands thus acquired exempt from liability for wrongs perpetrated as well as for debts contracted by those who secure them? The line of demarcation between the two great classes of the liabilities of parties, between liabilities created by agreement or by consent and liabilities created by torts, can never be absent from the minds of those members of Congress whose duty it is to criticise, amend, and perfect its acts. The Constitution of the United States broadened and deepened this line of separation, and projected it through all the legislation in the nation when it prohibited the states from impairing the obligation of contracts (U. S. Const. art. 1, sec. 10), but permitted them to impair the obligations of liabilities and judgment for wrongs. *Louisiana v. Mayor of New Orleans,* 109 U. S. 285, 288, 3 Sup. Ct. 211, 27 L. Ed. 936; *Garrison v. City of New York,* 21 Wall. 205, 22 L. Ed. 612; *McAfee v. Covington,* 71 Ga. 272, 51 Am. Rep. 263. * * * If an act provided that lands should be exempt from every liability incurred, there could be no doubt that they would be free from all liabilities, both from those arising out of contracts, and from those arising out of torts. If it provided that lands should be exempt from every debt contracted, but should still be chargeable with every other liability incurred by its owners, no one would have the hardihood to say that it was free from liability for their torts. These terms and their meanings could not have failed to occur to those who drafted, or to those who passed, the acts of Congress under consideration, and their rejection of the familiar and broad term 'liability in-

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curred' and their selection and adoption of the limited expression 'debt contracted' is a demonstration that they had no purpose to exempt the lands they gave from liability for wrongs which the patentees might have perpetrated and that they intended to free it from the debts which sprang from their agreements only."

And in the syllabus said:

"The exemption of lands acquired under the homestead laws and the timber culture laws (2 U. S. Comp. St. 1901, pp. 1534, 1535; Act March 4, 1896, c. 40, 29 St. at L. 43 [U. S. Comp. St. 1901, p. 1537]; Act June 14, 1878, c. 190, sec. 4, 20 St. at L. 113, 114; 2 U. S. Comp. St. 1901, p. 1398, sec. 2296; Act May 20, 1862, c. 75, sec. 4, 12 St. at L. 393) from any 'debt contracted' previous to their acquisition, does not exempt them from liabilities for the torts of the entrymen previously perpetrated."

We are therefore of opinion that the lien of interpleader's judgment attached to the allotment as soon as it came into being, that plaintiff took the land subject thereto, and that the same should be enforced and said land sold to satisfy the same, and that, too, notwithstanding the provisions of the fifteenth section of the act of July 1, 1902, which has no material bearing on the question.

The judgment of the trial court is reversed and rendered.

All the Justices concur.

ST. LOUIS & S. F. R. CO. v. BAGWELL.

No. 1609. Opinion Filed March 12, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 320.)

MASTER AND SERVANT—Injuries to Servant—Existence of Relation. One who, at the request of a conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, is, for the time being, the servant of the defendant and entitled to the same protection as any other servant.

(Syllabus by the Court.)

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Error from District Court, Hughes County; John Caruthers, Judge.

Action by J. B. Bagwell against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

W. F. Evans, R. A. Kleinschmidt, and *Fred E. Suits,* for plaintiff in error.

Langston, Hicks & O'Neill, for defendant in error.

WILLIAMS, J. It is claimed by counsel for plaintiff in error that the petition does not state a cause of action because it shows that the plaintiff was a mere volunteer for the work in which he was engaged at the time he received his injury.

Under the allegations of the petition the plaintiff was engaged in defendant's work at the request of the conductor in charge of the train, and, although it may be said that his employment was for mere temporary purposes, still, being in the defendant's employ at the request of its servant or the conductor who was in charge of the train, an emergency existing reasonably requiring such assistance in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, he was not a trespasser, but, for the time being, the servant of the defendant.

In *Aga v. Harbach,* 127 Iowa, at page 145, 102 N. W., at page 833, 109 Am. St. Rep. 377, 4 Ann. Cas. 441, it is said:

"It may be conceded that, generally speaking, a servant who is engaged to perform a given labor is not authorized to bind his master by the employment of a substitute or assistant. The relation of the master to a servant is one involving both responsibility and risk, and is not to be imposed by the act of another without authority or consent, express or implied. But in most lines of business the master cannot always remain, in person or by vice principal, in immediate supervision of the servant, and it not infrequently happens that some unforeseen contingency arises rendering it necessary, in the master's interest, that the servant have temporary assistance. In many such cases it has been held that the servant has implied authority to engage such temporary service, and that the substitute or assistant, if not in the law the

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employee of the master, is at least entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance."

In *Marks v. Rochester Railway Co.*, 146 N. Y. 181, 40 N. E. 782, in the opinion by Andrews, C. J., it is said:

"The complaint alleges that the plaintiff was engaged in assisting in the management of the car under the direction of the driver and was placed on the rear platform to drive the horse, and while so engaged was crowded from the platform by persons who were leaving the car and was thrown under the wheels and injured, and that the injury was caused by the negligence of the defendant. The only specification of negligence contained in the complaint is that the platform on which the plaintiff was stationed for the purpose of driving the horse was an unsafe and unfit place upon which to put a boy of his age to perform the duty imposed upon him. The trial judge submitted to the jury two questions, first, whether there existed such an emergency at the time as to authorize the driver of the car to employ outside assistance to get the car back to the switch; and, second, if the jury found that such an emergency existed, whether he was negligent in placing a young boy under the circumstances upon the platform to drive the horse. * * * It is not claimed that the driver had any general authority to employ servants for the defendant. If he had authority to employ assistance under the circumstances of the case, it was an authority outside of the general scope of his employment. Clearly he had no authority, express or implied, to call upon bystanders to assist him in the discharge of any service which he himself could reasonably perform. If third persons undertook upon his solicitation and for his convenience to assist him in extricating the car from the blockade, when he could have accomplished the work himself, no authority to employ assistance could be implied. Such an implication could only arise when, in view of all the conditions, the driver could not himself without assistance, having a proper regard for the safety of passengers and the care of the car, have undertaken to take the car back to the switch. It is obvious that the driver could not at the same time have managed the brake and driven the horse. The driver of the other car had his own car and the horse to look after, and it does not appear that there was any other employee of the company in the vicinity to whom the driver of the car which was to be moved could have applied for assistance. While the evidence is not very direct or satisfactory as to the necessity for aid, we think that question was properly submitted

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to the jury. The defendant gave no evidence upon the point. The conduct of the driver indicates that, in his opinion, assistance was necessary, and the jury might reasonably have reached the conclusion upon the evidence before them, in the absence of any contradictory evidence, that there was an emergency which gave to the driver authority to call in outside aid on the occasion. The authority of a servant is not in all cases confined to the rendering of personal service. In every business and employment there are exigencies which are not anticipated and which require a servant to act, in the absence of the principal, for the immediate protection of his interests, and he may do things in his interest when the emrgency arises which transcend his usual authority, and they will be deemed to have been authorized. The jury having found that such an emergency existed in this case, the employment of the plaintiff to drive the horse was the act of the principal, and, if his employment in this service directly by the principal would have been an act of negligence, his employment by the driver, acting for the time being in place of the master, was a negligent act imputable to the defendant. The service which the plaintiff was called upon to render was unquestionably intended to be a gratuitous service. He went upon the car in compliance with the request of the driver. If the service required of the plaintiff was a dangerous one for a boy of his age, from which personal injury to him might reasonably have been anticipated, the defendant might justly be chargeable if injury happened which was the natural consequence of the employment. The plaintiff, by reason of his youth and inexperience, might not appreciate the risk, and he would not be held to the exercise of the same discretion and judgment in entering upon the service as would be required of an adult."

See, also, to the same effect, *Sloan v. Railway Co.*, 62 Iowa, at page 736, 16 N. W., at page 334; *Johnson v. Ashland Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

In *Street Railway Company v. Bolton*, 43 Ohio St. 227, 1 N. E. 335, 54 Am. Rep. 803, it is said:

"The plaintiff in the court of common pleas was not a mere volunteer within the meaning of the rule of law contended for by plaintiff in error, but, as a passenger on the north-bound car, was interested in having it driven to its destination. To this end it was necessary to pass the south-bound car. This could only be accomplished by pushing the north-bound car back upon the siding. In doing this, although it may not have been absolutely necessary for the passenger to assist the driver, it was a prudent

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and reasonable act justified by the circumstances of the case, not a wrongful interference and intermeddling with business in which he had no concern. It was not, in fact or in law, an assumption of risk from the carelessness of the defendant or any of its servants. The law in this case is well stated in *Wright v. London & N. W. R. R. Co.*, 1 Q. B. Div. 252. That case was this: 'The plaintiff sent a heifer (which was put in a horse box) by defendants' railway to their P. station. On the arrival of the train at the station, there being only two porters available to shunt the horse box to the siding, from which alone the heifer could be delivered to the plaintiff, in order to save delay he assisted in shunting the horse box, and while he was so assisting he was run against and injured through a train being negligently allowed by the defendants' servants to come out of the siding. There was evidence that the station master knew that the plaintiff was assisting in the shunting and assented in his doing so. *Held*, affirming the decision of the queen's bench, that the plaintiff was not a mere volunteer assisting the defendants' servants, but was on the defendants' premises with their consent for the purpose of expediting the delivery of his own goods, and the defendants were therefore liable to him for the negligence of their servants, according to the principle of *Holmes v. North Eastern Ry. Co.*, L. R. 4 Ex. 254; 6 Ex. 123.'"

See, also, *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; *Barstow v. Old Colony R. Co.*, 143 Mass. 535, 10 N. E. 255.

It follows that the petition stated a cause of action, and the demurrer to the evidence, as well as the motion of the defendant for a directed verdict in its favor, were properly overruled.

There is no merit in the other assignments of error under the record.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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BAILEY v. WILLOUGHBY *et al.*

No. 1666. Opinion Filed May 14, 1912.

Rehearing Denied June 18, 1912.

(124 Pac. 955.)

JUDGMENT—Notwithstanding Verdict—Garnishment of Mortgaged Property—Tender of Amount Due. Where a summons in garnishment issued upon a judgment against R., and was served upon B., who answered, in effect, that he was not liable in garnishment, and where issue was joined thereon pursuant to Comp. Laws 1909, sec. 5718, and where the case turned upon the question of whether three bills of sale of even date theretofore executed by R. to J. and duly filed for record, were intended to evidence an absolute sale of six elevators from R. to J. which he had leased and of which B. was in possession as agent of the lessee, were intended to evidence a sale or were each in effect a mortgage, and the jury found that such they were, and where it further appeared that before the service of the summons in garnishment the conditions prescribed by Comp. Laws 1909, sec. 4432, were not observed, **held**, that defendant's motion for judgment **non obstante** on that ground should have been sustained.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by J. W. Willoughby, receiver, against J. C. Robb. Judgment for plaintiff, writ of garnishment issued against J. R. Bailey and Bailey brings error. Reversed and rendered.

C. J. Wrightsman, C. E. Bush, and *Victor O. Johnson,* for plaintiff in error.

Flynn, Ames & Chambers, for defendants in error.

TURNER, C. J. On January 7, 1905, J. A. Willoughby, as receiver of the Capitol National Bank of Guthrie, sued J. C. Robb, defendant in error, in the district court of Oklahoma county, and on January 18, 1905, recovered judgment against him by confession for $30,000. On May 3, 1905, execution issued thereon, and an affidavit of garnishment was filed, alleging, among other

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things, that said execution had issued, and had not been returned. On May 7, 1905, J. R. Bailey, plaintiff in error, was served with summons, and on the 9th answered, in effect that he was not liable to garnishment, upon which issue was joined as provided by Comp. Laws 1909, sec. 5718. By this proceeding it was sought to reach six elevators which it appears Robb had mortgaged to one J. Rosenbaum as security for a loan of $15,000, and which he had leased to J. Rosenbaum Grain Company, which had employed Bailey and placed him in charge. Neither the grain company nor Rosenbaum were parties, and Robb was not served with garnishment summons. The case was made to turn upon the question of whether the three bills of sale of even date, theretofore executed by Robb to Rosenbaum, and duly filed for record and known as Exhibits C, D, and E, reciting a consideration of $17,400, were intended to evidence an absolute sale of the six elevators herein described, or whether they were given as security for a loan, and were in fact a mortgage or mortgages. There was trial to a jury, which, in effect, found for plaintiff on this issue, and that the bills of sale were mortgages. Whereupon the court rendered judgment for plaintiff to that effect, and ordered that he take possession and sell the mortgaged property, and out of the proceeds first pay the mortgage debt, and turn the balance over to plaintiff in satisfaction of his judgment. After motion for a new trial filed and overruled, defendant, as garnishee, brings the case here.

It is contended that the court erred in overruling defendant's motion for judgment *non obstante*. Such was error. This proceeding was prosecuted upon the theory that, if plaintiff proved each of the three bills of sale in question to be a mortgage, he would be entitled to prevail and subject Robb's equity in the property to the payment of his judgment. As evidencing this theory, the bills of sale being, in terms, in effect the same, the court charged:

"The court instructs you that this bill of sale on its face indicates an absolute sale and transfer of all the right, title, and interest in this property from Mr. Robb to Mr. Rosenbaum, and, if there were no explanation of the transaction, it would be so construed, and is construed, outside of any explanation that has been

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made concerning it, as an absolute sale and transfer of all the interests of the defendant Robb to Mr. Rosenbaum, but the court further instructs you that, notwithstanding the fact it may have been upon its face evidence of an absolute sale, yet the mere form of the instrument of conveyance is not conclusive by any means as to the nature of the transaction, and if it was really intended as a security for the payment of a debt, rather than an absolute sale, may be proven upon the trial, and, if the evidence is satisfactory to the jury that that was the nature of the transaction, then the verdict of the jury in this case should be that the transaction was in fact a loan, with security taken in the form of a bill of sale, and not an absolute sale of the property. That is the only question for you to pass upon."

And the jury found:

"We, the jury drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find for the plaintiff and against the garnishee, J. R. Bailey, and that the three bills of sale, copies of which were introduced in evidence as plaintiff's Exhibits C, D, and E, were intended at the date of their execution as mortgages securing the repayment of a loan of $15,000, within three years from their date, by the defendant J. C. Robb to one J. Rosenbaum, and were not intended as evidence of an absolute sale of said property by the said defendant J. C. Robb to said J. Rosenbaum, and that at the date of the service of the garnishee summons herein said property was in the possession and under the control of the garnishee, J. R. Bailey."

And the judgment recited:

"That the three bills of sale made by said J. C. Robb to J. Rosenbaum on the 17th day of April, 1904, was not a *bona fide* sale of said personal property described in said bills of sale but was a mortgage only, securing the payment of fifteen thousand dollars ($15,000) advanced to J. C. Robb by the said J. Rosenbaum, and that the said fifteen thousand dollars ($15,000) is an equitable lien upon said property, and should be paid out of the proceeds of the sale of said property as hereinafter provided prior to the payment of the garnishment lien of the plaintiff herein."

Assuming the validity of the judgment on which the summons in garnishment issued, and that all parties in interest were before the court, the judgment complained of is contrary to law, and the motion for judgment *non obstante* should have been sustained. This for the reason that the statute provides:

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"Sec. 4431. Property May be Attached.—Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of a mortgagor.

"Sec. 4432.. Mortgagee's Rights—Creditor Subrogated—When.—Before the property is so taken the officer, on execution, or attachment creditor, must pay or tender to the mortgagee, the amount of the mortgage debt and interest, or must deposit the amount thereof with the county treasurer, payable to the order of the mortgagee. In the event that the attachment or execution levied on such property is defeated or for any reason fails, and the attachment or execution lien is held not good, and such deposit has been made with the county treasurer, the party procuring the issuance and levy of said attachment or execution shall be subrogated to all rights of the mortgagee in and to said property."

This payment was not made or tendered to the mortgagee or deposited with the county treasurer payable to his order.

In *Dodder et al. v. Moberly*, 28 Okla. 334, 114 Pac. 714, Shive interpleaded and claimed the attached property by virtue of a chattel mortgage thereon, executed and delivered to him by defendant to secure a debt, filed for record prior to the time the order of attachment came into the hands of the sheriff for service. The issue joined raised the priority of his lien. The court said:

"On the part of Shive, the interpleader, it is contended that the court erred in overruling his motion to dissolve the attachment, made after the jury had by their verdict sustained his interplea. In this we concur. On the coming in of the verdict, the jury, in effect, having found that the attached property was covered by the prior mortgage of Shive, that neither plaintiffs nor the sheriff, before levying the writ, had paid or tendered to him the amount of the debt and interest thereby secured, or deposited said money with the county treasurer to his order, as provided by Comp. Laws 1909, secs. 4431, 4432, it was the duty of the court *sua sponte* (18 En. Pl. & Pr. 431) to dissolve the attachment, order the property returned, and tax plaintiffs with the cost of the attachment and the cost of the interplea. This for the reason that, as Shive had a prior lien on the property, the plain letter of the statute was violated by the levy. *Ellis v. Smith*, 25 Okla. 234, 105 Pac. 653; *Moore v. Calvert et al.*, 8 Okla. 358, 58 Pac. 627."

In *Dix v. Smith*, 9 Okla. 124, 60 Pac. 303, 50 L. R. A. 714, the court said:

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"At common law, the equity of a mortgagor in property could not be attached; but by the statutes of several of the states this rule has been changed, so that the interest of a mortgagor in chattel property may be attached, garnished, or seized and sold under execution. This, however, can only be done by statutory permission. At common law, the legal title was, by the mortgage, vested in the mortgagee, and this title became absolute upon default. The mortgagor only had the equity of redemption, nothing more. The Supreme Court of Massachusetts, in the case of *Badlam v. Tucker,* 1 Pick. [Mass.] 399 [11 Am. Dec. 202], in speaking of the right to attach mortgaged personal property, said: 'A mere equitable interest cannot be taken and sold on execution; for, where there is no legal right, there is no legal remedy. This was settled on great deliberation by the court of King's Bench in the case of *Scott v. Scholey,* 8 East, 467; and the reasons there given are entirely satisfactory. The judgment of the court in that case was sanctioned by the court of common pleas in the case of *Metcalf v. Scholey,* 2 Bos. & P. (N. R.) 461, and is supported by all of the authorities. It is only by statute that equities or rights to redeem are subject to attachment by ordinary process, and no statute has authorized the attachment of such interest in personal property. A creditor can reach such interest of his debtor only by resorting to a court of equity, where he may be let in to redeem incumbrances.' The same court, in *Prout v. Root,* 116 Mass. 410, said: 'At law, and without statute intervention, the interest of the mortgagor is not liable to be taken on execution, because it is a mere equitable interest, and where there is no legal right there can be no legal remedy.' *Cochran v. Rich* [142 Mass. 15], 6 N. E. 781, also holds that the interest of a mortgagor in property mortgaged cannot be attached, and this rule of the common law has been enacted into statute in this territory."

Speaking to a similar statute in *Souza v. Lucas et al.* (Cal. App.) 100 Pac. 115, in the syllabus it is said:

"Civ. Code, sec. 2969, providing that, before mortgaged chattels may be taken under an attachment, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or deposit the amount thereof, etc., measures the power of the officer in effecting a legal attachment; and, when the conditions are not observed, the writ affords no justification, and neither the officer nor the creditor acquires any lien on the property."

See, also, *William Deering Co. v. Warren,* 1 S. D. 35, 44 N. W. 1068; *Mabry v. Metropolitan Trust Co.,* 94 Ga. 619, 21 S. E. 589; *Foster v. Perkins,* 42 Me. 168.

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The cause is reversed and rendered.
All the Justices concur.

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*TAYLOR v. PARKER *et al.*

No. 1734. Opinion Filed May 14, 1912.

Rehearing Denied June 25, 1912.

(126 Pac. 573.)

1. **INDIANS—"Alienable"—"Inalienable"—Disposition by Will.** The words "alienable" and inalienable," used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and Choctaws (Act July 1, 1902, c. 1362, 32 St. at L. 642, 643, pars. 12, 15, 16), include disposition by will.

2. **SAME—Restriction of Alienation—Wills.** The effect of the act of April 28, 1904 (33 St. at L. 573, c. 1824), was to make the laws of Arkansas, theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to wit, Indians and their property, in so far as it was alienable under the acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the state of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by act of Congress.

(Syllabus by the Court.)

Error from District Court, Johnston County; A. T. West Judge.

Action between Rual F. Taylor and Allie Parker and others. From the judgment, Taylor brings error. Affirmed.

C. C. Hatchett, for plaintiff in error.

Cruce, Cruce & Bleakmore, for defendants in error.

KANE, J. This controversy grows out of the settlement of the estate of one Maggie Taylor, deceased, a duly enrolled Chickasaw Indian of part Indian blood, who, prior to her death on the 25th day of March, 1905, attempted to will her allot-

*Appealed to the United States Supreme Court.

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ment to her husband, Rual F. Taylor, plaintiff in error herein. As stated by counsel for plaintiff in error in his brief:

"The sole and only question involved in this case is: At the time of the death of the said Maggie Taylor, which was on the 25th day of March, 1905, did she have the right to make a will effectual to convey her Indian allotment to her husband, plaintiff in error? If she did, then the action of the trial court in sustaining a demurrer to the defendant's answer, and rendering judgment against the defendant, now plaintiff in error, was error, and the plaintiff in error is the rightful owner of the lands in controversy in this action. If the deceased, Maggie Taylor, did not have the right to make a will effectual to pass the title to her Indian allotment at her death, then her husband, Rual F. Taylor, will receive no part of her land, for under the laws in force in the Indian Territory at that time he inherited no interest therein, there having been no issue born of the marriage."

Hayes v. Barringer, 7 Ind. T. 697, 104 S. W. 937, and 168 Fed. 221, 93 C. C. A. 507, involved the right of a full-blood Chickasaw Indian, duly enrolled and entitled to an allotment under Act June 28, 1898 (30 St. at L. 495, c. 517), and the Supplemental Agreement of July 1, 1902 (32 St. at L. 641, c. 1362), to devise her property to the plaintiff Barringer. The Court of Appeals of the Indian Territory held that under section 12 of the Supplemental Agreement, ratified by Act Cong. July 1, 1902 (32 St. at L. 641, c. 1362), a Chickasaw Indian cannot alienate his homestead until 21 years have elapsed after the date of the allotment; that the only difference between homestead and surplus, or other half, of the Indian's land, is in the length of time which must elapse before it is alienable. The Circuit Court of Appeals affirmed the judgment of the court below, and held specifically that "the words 'alienable' and 'inalienable,' used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and Choctaws (Act July 1, 1902, c. 1362, 32 St. at L. 642, 643, pars. 12, 15, 16), include disposition by will."

Counsel for plaintiff in error distinguishes the Barringer case from the case at bar as follows:

"Proceeding one step further we find that on April 28, 1904, after the death of the testator in the case of *Hayes v. Barringer*, Congress passed an act providing for the appointment of four

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additional judges in the Indian Territory, and among other things enacted: 'All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indian, freedmen or otherwise' (33 St. at L. 573)"

—that by the law of wills contained in chapter 155, Mansf. Dig. of Ark., thus extended, Maggie Taylor was empowered to devise by last will and testament all her estate, real and personal.

We do not believe this contention can be sustained. The effect of the act of April 28, 1904 (33 St. at L. 573) was to make the laws of Arkansas, theretofore put in force in the Indian Territory, applicable to another class of persons and estates, to wit, Indians and their property, in so far as it was alienable under the acts of Congress then bearing upon it. The extension of the law of wills enabled the Indian to devise all his alienable property by will made in accordance with the laws of the state of Arkansas, but did not operate to remove any of the restrictions theretofore placed upon lands of Indians by act of Congress. The law in relation to restrictions is stated by Sanborn, Circuit Judge, in *Hayes v. Barringer, supra,* as follows:

"A homestead, consisting of land equal in value to 160 acres of average allottable land, selected by the allottee, 'shall be inalienable during the life-time of the allottee, not exceeding twenty-one years from the date of the certificate of allotment.' Section 12 (32 St. at L. 642). The remainder of the land allotted 'shall not be alienable by the allottee, or his heirs, at any time before the expiration of the Choctaw and Chickasaw governments, which expired March 4, 1906 ([Act June 28, 1898, c. 517] 30 St. at L. 512), for less than its appraised value,' but may be alienable one-fourth in acreage in one year, one-fourth in acreage in three years, and one-half in acreage in five years, from the date of the patent. Section 16 (32 St. at L. 643). Lands allotted shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated, nor shall said land be sold except as herein provided. Section 15 (32 St. at L. 642)."

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As a will is held to be an alienation within the meaning of the Supplemental Agreement, and as the act of Congress of April 28, 1904, *supra,* did not have the effect of removing any of the restrictions placed upon Indian allotments by said agreement, it must be held that Maggie Taylor did not have power to devise her allotment by will, and the judgment of the court below must be affirmed.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

KANSAS CITY, M. & O. RY. CO. v. WILLIAMS.

No. 2835. Opinion Filed March 12, 1912.

Rehearing Denied May 7, 1912.

(124 Pac. 63.)

APPEAL AND ERROR—Dismissal—Case-Made—Service on Adverse Party. The syllabus in **American National Bank of McAlester v. Mergenthaler Linotype Co.**, 31 Okla. 533, 122 Pac. 507, is made the syllabus here.

(Syllabus by the Court.)

Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Otho Littington Williams against the Kansas City, Mexico & Orient Railway Company and C. B. McGee. Judgment for plaintiff, and defendant company brings error. Dismissed.

John A. Eaton, D. W. Eaton, H. J. Eaton, Everett Petry, and *Geo. E. Black,* for plaintiff in error.

Bond & Melton, for defendant in error.

TURNER, C. J. On January 28, 1910, Otho L. Williams, defendant in error, sued the Kansas City, Mexico & Orient Railway Company, plaintiff in error, and C. B. McGee, in damages for personal injuries. On April 18, 1911, there was trial to the court and judgment for plaintiff and against the defendant com-

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pany and in favor of McGee, and the company brings the case here without making McGee a party to this proceeding in error.

This was the precise state of the record in *Humphrey et al. v. Hunt,* 9 Okla. 196, 59 Pac. 971, where a motion to dismiss was sustained for want of necessary parties, as is sought to be done here. In that case Maggie Hunt sued Lewis Humphrey and others in damages for personal injuries, which resulted in a verdict and judgment rendered and entered for plaintiff and against all defendants save one Belt, who had judgment against plaintiff. The defendants against whom the judgment went prosecuted proceedings in error, serving only plaintiff with the case-made. In sustaining the motion the court, in effect, held that, as Belt might be prejudicially affected by a reversal of the joint judgment by which he was discharged from all liability to the plaintiff, he was a necessary party to the appeal, and dismissed the cause. We have followed this ruling in *Strange et al. v. Crismon,* 22 Okla. 841, 98 Pac. 937; *Board of County Commissioners, etc., et al. v. Lemley,* 23 Okla. 306, 101 Pac. 109; *Weisbender et al. v. School District, etc.,* 24 Okla. 175, 103 Pac. 639; *Spaulding Manufacturing Co. v. Dill et al.,* 25 Okla. 395, 106 Pac. 817, and the *American National Bank of McAlester v. Mergenthaler Linotype Co.,* 31 Okla. 533, 122 Pac. 507. And this too, although, as here, after the time for the service of the case-made on McGee plaintiffs in error have amended their petition in error by making McGee a party defendant in error in this court, and he has entered his appearance and waived service of the case-made, for the reason that a failure to serve the case-made upon McGee within the time allowed defeats the jurisdiction of this court and prevents a review of the judgment, although he subsequently appeared in this court and waived service of the case-made. *American Nat. Bk. v. Mergenthaler, etc., Co., supra.* The appeal is dismissed.

All the Justices concur.

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FELKNER v. WINNINGHAM *et al.*

No. 3028. Opinion Filed January 9, 1912.

Rehearing Denied May 14, 1912.

(122 Pac. 534.)

1. **SCHOOLS AND SCHOOL DISTRICTS—Territory Lying in More Than One County—Procedure.** The consolidation of school districts comprising territory lying in more than one county is authorized.

(a) In such case, all of the districts proposed to be consolidated having voted to unite, the county superintendents of each of the counties in which such districts lie must act together by meeting and declaring said districts disorganized, and then and there forming a consolidated district composed of the several voting to unite.

(b) Said superintendents are also required to designate a time and place for the meeting of the voters of the said districts so disorganized for the purpose of electing officers for and completing the organization of said consolidated district.

2. **SAME—Consolidation—Appeal.** From the action of the county superintendents thus acting jointly, an appeal may be had to the State Superintendent of Public Instruction, but not to the board of county commissioners of either of the counties in which any of said school districts are located.

(Syllabus by the Court.)

Error from District Court, Washita County; James R. Tolbert, Judge.

Injunction by J. H. Felkner against W. F. Winningham and others. From an order dissolving the injunction, plaintiff brings error. Affirmed.

Richard A. Billups, T. A. Edwards, and *Ara R. Ash,* for plaintiff in error.

Brett & Rice, for defendants in error.

WILLIAMS, J. On the 23d day of May, 1911, an election was held in school district No. 66, Washita county, Okla., to determine whether or not said district would disorganize and form a consolidated district with districts 61 and 62 of Beckham coun-

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ty, Okla. The clerk of said district No. 66 reported to the county superintendent that said election resulted in favor of consolidation. On the 17th day of June, 1911, the county superintendent of Washita county, acting upon the certificate of the clerk of said district, made his order declaring district 66 in Washita county disorganized, and proclaiming a consolidated district formed, comprising said district No. 66 in Washita county and districts numbered 61 and 62 in Beckham county, and designated a time and place to hold an election to select officers for said consolidated district. On the 23d day of June, 1911, within ten days after the county superintendent disorganized said district 66, an appeal was taken therefrom setting forth various reasons why said order disorganizing said district No. 66 should not have been made, among which was that a majority of the voters voting at said election did not vote in favor of consolidation. This appeal was filed with the board of county commissioners of said Washita county; the said district 66 lying entirely within said county. On the 6th day of July, 1911, the appeal was dismissed by the board of county commissioners on the ground that they had no jurisdiction to hear and determine the same. On the 7th day of July, 1911, the plaintiff in error filed a petition in the district court, praying for a writ of mandamus to require the said commissioners to hear said appeal. On the 7th day of July, 1911, plaintiff in error filed a petition in the district court praying for a temporary order of injunction restraining defendants in error as directors of the proposed consolidated district, of which district 66 formed a part, from performing any acts as directors of such proposed consolidated district until the determination of said mandamus proceeding, and a temporary injunction was granted by the county judge in the absence of the district judge from the said county. On the 17th day of July, 1911, the defendants in error filed an unverified motion with the district court to have said injunction dissolved. The same was heard in chambers at Arapaho, and an order made dissolving the same. This proceeding in error is to review said order.

On March 10, 1905, the Legislature of the territory of Oklahoma passed an act entitled,

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"An act to provide for the formation of consolidated school districts by the voluntary disorganization and consolidation of adjacent school districts, the establishment of consolidated schools in which certain branches shall be taught, the transportation of pupils to and from school, and the disposition of the property and indebtedness of the said disorganized districts." (Sess. Laws 1905, pp. 358, 362.)

Section 1 of said act provides:

"Meetings of the voters of any two or more adjacent school districts may be called in their respective districts for the purpose of voting on the proposition of uniting with the other said adjacent districts for the purpose of establishing a consolidated school, said call to be made in the same manner as provided by law for the calling of special district meetings. If three-fourths of the voters residing in each of said districts shall vote to so unite, then the clerk of each of said districts shall thereupon make a written report of such action to the county superintendent of the county in which said districts are located; provided that the vote in each district shall be made conditional upon its carrying in all of said districts, and provided further that unorganized territories and legally organized school districts containing a school population of one hundred persons or more, may organize under the provisions of this act. The number of persons entitled to vote in said election shall for the purpose of this act be determined by the last returns of the enumeration of the respective districts included in said school district."

Section 2 of said act provides:

"The county superintendent shall, upon receipt of the reports as provided in section 1 of this act, declare said districts disorganized and shall form a consolidated district composed of the several districts voting to unite, and he shall designate a time and place for the meeting of the voters of the said districts so disorganized for the purpose of electing officers and completing the organization of said consolidated district. He shall give notice of said meeting by posting written or printed notices, stating the time, place and purpose of said meeting in at least three public places in each of the disorganized districts not less than ten days prior to the time of meeting; provided, that in the formation of consolidated districts comprising territory lying in more than one county, the county superintendents of said counties shall act together in the same manner as provided by law in the formation and control of joint districts, and at said meeting of the voters of the newly organized school district, shall select a build-

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ing site, as near the center of population of such consolidated district as practicable."

At the first session of the Legislature after the erection of the state, said section 1 was amended to read as follows:

"Meetings of the voters of any two or more adjacent school districts may be called in their respective districts for the purpose of voting on the proposition of uniting with the other said adjacent districts for the purpose of establishing a consolidated school, said call to be made in the same manner as provided by law for the calling of special district meetings. If a majority of the votes cast in each of said districts shall be in favor of such consolidation, then the clerk of each of said districts shall thereupon make a written report of such action to the county superintendent of the county in which said districts are located. The vote in each district shall be made conditional upon its carrying in all of said districts; Provided, that unorganized territories and legally organized school districts containing a school population of one hundred persons or more may organize under the provisions of this act." (Sess. Laws 1907-1908, p. 670; section 8169, Comp. Laws 1909.)

In said section 1 as amended it is provided:

"If a majority of the votes cast in each of said districts shall be in favor of such consolidation, then the clerk of each of said districts shall thereupon make a written report of such action to the county superintendent of the county in which said districts are located."

Does this contemplate that all of said districts are to be located in one county, and that the report shall be made to the county superintendent of the county in which such districts are located, or does it mean that the clerks of the respective districts shall make a report to the respective county superintendents of the counties in which said districts are located? In order to determine the proper construction, it is necessary to look to the other provisions of the act. The proviso in section 2 (section 8170, Comp. Laws 1909) is as follows:

"Provided, that in the formation of consolidated districts comprising territory lying in more than one county, the county superintendents of said counties shall act together in the same manner as provided by law in the formation and control of joint districts, and at said meeting of the voters of the newly organ-

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ized school district, shall select a building site, as near the center of population of such consolidated district as practicable."

Section 8 of the act of March 10, 1905 (chapter 33, p. 361, Sess. Laws 1905), provides:

"In all matters relating to consolidated school districts, not provided for in this act, the law relating to school districts shall be in force where said laws are applicable."

The act of March 8, 1895 (article 6, c. 45, p. 245, Sess. Laws 1895; section 8080, Comp. Laws 1909), provides:

"When it shall become necessary to form a school district lying partly in two or more counties, the county superintendents of the counties in which the said tract of country shall be situated, when application shall be made in writing to any one of them by five householder residents therein, shall, if by them deemed necessary, meet and proceed to lay off and form the same into a school district, issue notices for the first district meeting, and shall file the proper papers in their respective offices, and such district so organized shall be designated 'Joint District No. ———, Counties of ———,' and the boundaries of such district shall not be altered except by the joint action of the superintendents of the several counties represented in said district; Provided, that if in the alteration of or refusal to alter the boundaries of any joint school district, any person or persons shall feel aggrieved, such person or persons may appeal to the Territorial [State] Superintendent of Public Instruction, and notice of such appeal shall be served on the superintendents of the several counties represented in said district within ten days after the rendition by them of the decision appealed from, which notice shall be in writing and shall state fully the objections to the actions of the county superintendents, and a copy thereof shall be filed with the Territorial [State] Superintendent of Public Instruction; and it shall be the duty of the county superintendents in whose possession are the papers connected with the action appealed from, to transmit the same to the Territorial [State] Superintendent of Public Instruction immediately upon being served with notice of appeal as hereinbefore provided, and thereupon the Territorial [State] Superintendent of Public Instruction shall fix a time for the hearing of said appeal, and notify the several county superintendents interested, and they shall take action in accordance therewith: And provided, further, that each joint district, except in matters relating to the alteration of the boundaries thereof, shall be under the jurisdiction and control of the superintendent of that county

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represented in such district having the largest amount of territory embraced within the boundaries of such joint district."

Obviously, by the proviso to section 2, *supra,* consolidation is permitted when the districts lie in different counties. After the several clerks of the different districts have certified the result of the election in each district to the proper county superintendent of the different counties, then "the county superintendents of the counties in which the said tract of country shall be situated" are required to meet and declare said districts disorganized and form a consolidated district composed of the several districts voting to unite.

The county superintendents of said counties are also required to designate a time and place for the meeting of the voters of the said districts so disorganized for the purpose of electing officers and completing the organization of said consolidated district following the procedure prescribed by section 8170, Comp. Laws 1909.

From the action of the county superintendents, acting jointly, section 8080, Comp. Laws 1909, provides that an appeal may be had to the Territorial [State] Superintendent of Public Instruction, and that notice of said appeal shall be served on the county superintendents of the several counties represented in said district within ten days after the rendition by them of the decision appealed from, which notice shall be in writing and shall state fully the objections to the actions of the county superintendents, etc. It follows that an appeal from the action declaring these three districts, one of which lies in Washita county, and the other two in Beckham county, consolidated, did not lie to the board of county commissioners, and that said board had no jurisdiction to entertain said appeal.

As to whether said consolidated district has been legally formed, that question is not before this court for determination. But, as the petition for injunction was predicated upon the fact that the plaintiff in error was entitled to appeal to the board of county commissioners to have reviewed the action of the voters of school district No. 66 in voting to disorganize, it follows that

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plaintiff in error was not entitled to the injunctive relief prayed for.

The judgment of the lower court is therefore affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

BOARD OF COUNTY COMMISSIONERS OF GREER CO. v. HENRY *et al.*

No. 3332. Opinion Filed May 14, 1912.

Rehearing Denied June 27, 1912.

(126 Pac. 761.)

COUNTIES—Officers—County Attorney—County Clerk—Salaries. At the time of the adoption of the Constitution, the salary of the county attorney elected at that time, being fixed at $2,000 per annum by section 18 of the Schedule, because of article 23, section 10, of the Constitution, cannot be changed during his term of office, and was not reduced by a decrease in the population of the county, ascertained according to a census taken pursuant to the act of April 8, 1908 (Laws 1907-08, c. 9, art. 1). Nor was the salary of the county clerk, elected at the same time, nor the $600 allowed him for clerk hire thereby reduced, being fixed by act of March 10, 1905 (Laws 1905, c. 19, art. 1), extended to and put in force throughout the state. But the latter, being no part of his salary, could be and was raised by the act of May 29, 1908 (Laws 1907-08, c. 25, art. 1), allowing the clerk for clerk hire $800.

(Syllabus by the Court.)

Error from Greer County Court;
Charles H. Eagin, Judge.

Action by H. D. Henry and others against the Board of County Commissioners of Greer County. Judgment for plaintiffs, and defendant brings error. Affirmed on conditions.

J. L. Carpenter, for plaintiff in error.

H. D. Henry and *Tisinger, Clay & Robinson,* for defendants in error.

TURNER, C. J. On March 7, 1911, H. D. Henry, defendant in error, sued the board of county commissioners of Greer

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county, plaintiff in error, in the county court of Greer county, for $722.91. His petition substantially states that on September 17, 1907, he was duly elected, and on November 18, 1907, duly qualified, as county attorney of said county; that at said time the population of said county was in excess of 22,000 and that his salary, being fixed on a basis of population, was $2,000 per annum; that said salary was paid him from that time up to and including June 30th, 1909; that from July 1st, 1909, up to and including June 17, 1910, he was paid a salary at the rate of $1,250 per annum; that he should have been paid a salary of $2,000 per annum, and prayed judgment for $722.91, the difference between the two amounts, a claim which he says has been rejected by the county commissioners. For answer defendant, after pleading a general denial, specifically admitted the facts set forth in the petition, and that plaintiff's term of office expired January 11, 1907, and further alleged that on May 22, 1909, an election was held pursuant to law, the result of which was that Harmon county was carved out of Greer county, and created on June 2, 1909, pursuant to the proclamation of the Governor; that on May 5, 1909, said board, pursuant to law, caused to be taken a census of the remaining portion of Greer county as it would be when Harmon county was organized, and, after ascertaining the population thereof to be 15,666, filed a correct certificate of said census with the Secretary of State; that the object of said census was that said board might know what compensation the county officers of Greer county, including plaintiff, would be entitled thereafter to receive; that the population of Greer county on June 1, 1909, being as stated and less than 20,000, the compensation of the county attorney was $1,250 per annum, which had been paid up to and including June 17, 1910, and that, there being no salary due him under the Constitution and laws of the state, asked to be discharged.

On May 22, 1911, Floyd McNeill, defendant in error, by leave intervened, setting up a similar state of facts, except that he was elected at the same time county clerk of Greer county, with compensation fixed by law at $1,600 per annum salary and $800 per annum for clerk hire, making $2,400 per annum which

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he received up to June 30, 1909; that at that time the county commissioners, by reason of the reduction in population to 15,666, wrongfully reduced his salary to $1,300 per annum, and to $500 per annum for clerk hire, making $1,800 per annum which was paid him up to and including June 17, 1910, and sues for $634, $300 of which being the difference between $800 allowed and what he received. The issues joined with him by answer were substantially the same as the issues joined with the county attorney. On this state of the pleadings there was judgment for the plaintiff and intervener for the respective amounts claimed, and the board of county commissioners brings the case here.

It is assigned that the court erred in rendering judgment on the pleadings in favor of defendants in error. Whether such was error depends upon a proper construction of article 23, section 10, of the Constitution and section 18 of the Schedule.

In *Guldin v. Schuylkill County*, 149 Pa. 210, 24 Atl. 171, the court said:

"It is a familiar canon of construction that one part of a statute must be so construed that the whole may, if possible, stand; and this is equally applicable to the construction of the organic law of the commonwealth. A single provision may not be selected out of several relating to the same subject, and full, literal meaning given to its words without reference to the qualifying effect of other provisions, and thus produce an apparent repugnance of one provision to another. On the contrary, all the provisions relating to a particular subject, and all others qualifying such provisions, no matter where they may stand in the Constitution, are to be grouped together, when considering such subjects, and so read that they may blend or stand in harmony, if that can be done without violence to the language."

That the salaries of defendants in error could not be lowered after their election and during their term of office is made apparent by coupling those sections together in their inverse order with the word *but*. Stripped to the point and so considered they read:

"Until otherwise provided by law, the * * * salary * * * of all county * * * officers, * * * shall be as now provided by the laws of the territory of Oklahoma, for like named officers. * * * Provided, further, that county attorneys * * * of the several counties of the state having a population of more than twenty

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thousand shall be paid a salary of two thousand dollars per annum," (but) "except wherein otherwise provided in this Constitution, in no case shall the salary or emolument of any public official be changed after his election or appointment, or during his term of office. * * *"

The latter section, operating, as it does, as a limitation upon the lawmaking power contained in the former, should be read in connection therewith. This was the method of construction adopted in the Guldin case, *supra*. The plaintiff was elected to the office of coroner of Schuylkill county at the general election in 1889, and entered upon the discharge of his duties as such in January, 1890. At that time the population of the county was less than 130,000. The first federal census taken as of June, 1890, placed the population at over 150,000. Out of these facts arose the question whether plaintiff, on this increase of population, became subject to the provisions of March 31, 1876 (P. L. 13), passed carrying into effect article 14, section 5, of the Constitution, or whether he was entitled to continue to receive the fees prescribed by law to be paid him at the time of his election. The court, after saying that the solution of this question depended upon a proper construction of said section, which reads, "The compensation of county officers shall be regulated by law," and that "in counties containing over 150,000 inhabitants all county officers shall be paid by salary," construed with article 3, section 13 of the Constitution, which reads, "No law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment," said:

"The subject now under consideration is the compensation of county officers. The mandate of section 5 of article 14, which relates to that subject, is that such compensation shall be regulated by law. Any limitation upon the lawmaking power upon this subject, though appropriately placed in the article upon legislation, would necessarily be a qualification of this mandate, and should be read in connection with it. Such limitation is found in section 13 of article 3, which ordains that 'no law shall extend the terms of any public officer, or increase or diminish his salary or emolument, after his election or appointment.' Reading so much of the two sections as relate to the subject under consideration together, they are literally as follows: 'The compensation

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of county officers shall be regulated by law, [and] in counties containing over 150,000 inhabitants all county officers shall be paid by salary; [but] no law shall increase or diminish his [a public officer's] salary or emoluments after his election or appointment.' No paraphrase of this language can make it any plainer as applicable to the present case. When the plaintiff was elected to the office of coroner of Schuylkill county, the emoluments of that office were certain fees prescribed by law. At that time the salary act of 1876 had no application to him or to his office. To give it such application after part of his term had expired, and thereby take away his fees and substitute therefor a salary less than the aggregate amount of the fees authorized when he accepted the office, is to diminish his emoluments by law after his election, and the result is precisely the same as it would have been if the law had been passed after his election."

—and reversed the cause and entered judgment for plaintiff, upon his case stated, for his fees.

See, also, *Welsh v. R. H. Bramlet,* 98 Cal. 219, 33 Pac. 66; *Kehn v. State of N. Y.,* 93 N. Y. 291; *Jacobs v. United States,* 41 Ct. Cl. 452; *Board of County Com'rs v. Burns,* 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415; *Guthrie v. Board of County Com'rs,* 7 Wyo. 95, 50 Pac. 229.

We are therefore of opinion that when Harmon county was carved out of Greer county, and the board of county commissioners of Greer county, pursuant to the act of April 8, 1908, (Laws 1907-08, c. 9, art 1), took the census and ascertained the same to be 15,666, this did not, by operation of law, reduce the salary of the county attorney, during his term of office, from $2,000 to $1,250 per annum, the salary fixed by Wilson's Rev. & Ann. St. 1903, sec. 3027a, for county attorneys in counties of that population, nor reduce the salary of interpleader as county clerk, and that the court did not err in so holding and rendering judgment on the pleadings accordingly.

But what we have said, while it applies to the salary, does not apply to the amount allowed the county clerk for clerk hire. At the time of the admission of the state, Greer county having a population of over 22,000 and less than 30,000, section 18 of the Schedule fixed the salary of intervener at $1,600, and allowed him $600 for clerk hire, as prescribed by the act of March

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10, 1905 (Laws 1905, c. 19, art. 1), extended to and put in force throughout the state. While we have just held that this salary of $1,600 could not be raised or lowered during intervener's term of office, which expired January 9, 1911, such we cannot hold with reference to the $600 for clerk hire, which, being no part of his salary, and the person hired having no term (*Board of County Com'rs v. Hart*, 29 Okla. 693, 119 Pac. 132, 37 L. R. A. [N. S.] 388), could be raised or lowered at any time by act of the Legislature. While no act of the Legislature complained of attempted to lower his salary, the act of May 29, 1908 (Laws 1907-08, c. 25, art. 1), raised the allowance for clerk hire to $800. While the result of the census showing the population of the county to have decreased to 15,666 had no effect upon the allowance for clerk hire, said act of May 29, 1908, *supra,* did, and raised it $200.

As intervener concedes he has recovered too much, and is willing to enter a *remittitur,* the cause is reversed and remanded, with directions to figure his allowance for clerk hire from Nov. 16, 1907, up to the act of May 29, 1908, at $600, as provided in that act, and thereafter figure it as therein provided up to June 17, 1910. Should intervener enter a *remittitur* down to the amount thus ascertained to be due and payable to him for clerk hire, the judgment will then be thus modified and affirmed; otherwise the court is directed to grant a new trial as to him. In all other respects, the judgment of the trial court is affirmed.

KANE and DUNN, JJ., concur; WILLIAMS, J., concurs in the result; HAYES, J., not participating.

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Ex parte ANDERSON.

No. 3884. Opinion Filed June 11, 1912.

(124 Pac. 980.)

1. **COURTS—Rules of Decision—Previous Decisions Controlling.** It is a settled policy of this court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction.

(a) The same rule applies as to the determination of the constitutionality of a criminal statute.

2. **CRIMINAL LAW—Statutes—Jurisdiction of Courts—General and Special Laws.** The act of March 6, 1909, entitled "An act creating and establishing a county superior court for each county of the state having a population of 30,000, and a city therein of 8,000, and fixing the jurisdiction of said courts, * * * " (Laws 1909, c. 14, art. 7), is not in conflict with section 12, art. 7, in that it confers misdemeanor jurisdiction on said court.

(a) Said act is not repugnant to section 59, art. 5, which provides that laws of a general nature shall have a uniform operation throughout the state.

(b) It is not violative of section 46y, art. 5, of the Constitution, which forbids the passage of any local or special law authorizing the summoning or impaneling of grand or petit juries.

3. **STATUTES—Effect of Partial Invalidity—Creation of Court.** Section 2 of the act of March 6, 1909, entitled "An act creating and establishing a county superior court for each county of the state having a population of 30,000, and a city therein of 8,000, and fixing the jurisdiction of said courts, * * * " (Laws 1909, c. 14, art. 7), conferred jurisdiction on the superior courts in misdemeanor cases. Section 6 of the same act, providing the procedure and practice for such court, contained a proviso that all misdemeanor cases should be tried in said court by a jury of six men instead of twelve. This proviso was declared by the Criminal Court of Appeals to be repugnant to the Constitution. **Held** that, although that part of the statute is unconstitutional, yet that fact alone is not sufficient to authorize this court to declare that part of section 2 conferring misdemeanor jurisdiction on the superior courts void, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be assumed that the Legislature would have passed the one without the other.

(Syllabus by the Court.)

Application by Tom Anderson for writ of *habeas corpus*. Denied.

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Kistler, McAdams & Haskell, for petitioner.

Smith C. Matson, Asst. Atty. Gen., opposed.

WILLIAMS, J. On February 1, 1911, the petitioner, Tom Anderson, was convicted in the superior court of Muskogee county on a charge of violating the prohibitory liquor laws of the state, and his punishment was assessed at thirty days' imprisonment in the county jail and a fine of $200. In due time, a proceeding in error to review said judgment was prosecuted in the Criminal Court of Appeals. On April 8, 1912, the said court affirmed said judgment of conviction.

Counsel for petitioner urge that the act of March 6, 1909, entitled "An act creating and establishing a county superior court for each county of the state having a population of 30,000, and a city therein of 8,000, and fixing the jurisdiction of said courts, * * *" (Sess. Laws 1909, p. 181), is repugnant to the Constitution of this state, for the following reasons: (1) In conflict with section 7, art. 12, in that it confers misdemeanor jurisdiction on said court; (2) repugnant to section 59, art. 5, which provides that laws of a general nature shall have a uniform operation throughout the state; (3) violative of section 46y, art. 5, forbidding the passage of any local or special law authorizing the summoning or impaneling of grand or petit juries; (4) that part of said act providing for a jury of six in said court for the trial of misdemeanor cases being in conflict with the Constitution (*Hill v. State,* 3 Okla. Cr. 686, 109 Pac. 291), the same falls, and therefore the entire provision relating to misdemeanor jurisdiction must fall.

In *State ex rel. Ikard v. Russell, Judge, ante,* 124 Pac. 1092, it was held to be the settled policy of this court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction. The same rule applies in determining the constitutionality of a criminal statute. *State v. Russell, supra; Herndon v. Hammond, County Judge,* 28 Okla. 616, 115 Pac. 775; *Flood v. State ex rel.,* 27 Okla. 852, 113 Pac. 914; *Ex parte Justus,* 26 Okla. 101, 110 Pac. 907.

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It is urged by counsel for the petitioner that this court is not bound by the decisions of the Criminal Court of Appeals; that the Supreme Court is the highest court in point of rank and jurisdiction in the state, the Criminal Court of Appeals being inferior to it, and, under the supervisory power of the Supreme Court, may be restrained within its proper jurisdiction and its holdings reviewed. The Assistant Attorney General insists that, if such supervisory power exists, *certiorari,* and not *habeas corpus,* is the remedy, citing *Carnall v. Crawford,* 11 Ark. 604. It is not essential to determine this question in this case.

Section 2, art 7, of the Constitution, is as follows:

"The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of *habeas corpus,* mandamus, *quo warranto, certiorari,* prohibition, and such other remedial writs as may be provided by law, and to hear and determine the same. * * *"

The Criminal Court of Appeals in certain cases has jurisdiction in prohibition, mandamus, and *habeas corpus* proceedings. *Herndon v. Hammond, County Judge, supra; Eubanks v. Cole,* 4 Okla. Cr. 25, 109 Pac. 736; *State ex rel. Sims v. Caruthers, Judge,* 1 Okla. Cr. 428, 98 Pac. 474; *Ex parte Show,* 4 Okla. Cr. 416, 113 Pac. 1062; *Ex parte Adair,* 5 Okla. Cr. 374, 115 Pac. 277; *Ex parte Martin,* 6 Okla. Cr. 224, 118 Pac. 155; *State ex. rel. v. Russell, Judge, supra.*

In *Anderson v. State,* 7 Okla. Cr. 130, 123 Pac. 442, it was held that the superior courts of this state have concurrent jurisdiction with the county courts to hear and determine misdemeanor cases, following *Ex parte Whitehouse,* 3 Okla. Cr. 99, 104 Pac. 372. This court, in *Burks v. Walker,* 25 Okla. 353, 109 Pac. 544, seems to have concurred in that holding.

In *Oklahoma Fire Insurance Co. v. Phillip,* 27 Okla. 234, 111 Pac. 334, it was held: "County superior courts created by the act

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of the Legislature approved March 6, 1909 (Sess. Laws 1909, p. 181), have, except as to matters of probate, concurrent jurisdiction with the county courts in all civil and criminal matters." In that case the validity or constitutionality of the act was not challenged, and therefore its repugnancy to the Constitution of this state was not passed on, and such question has never been passed on by this court when it was essential to the determination of the case, or under any state of facts except when it may be regarded as clearly *obiter*.

The Criminal Court of Appeals having construed the act creating the superior court as to its misdemeanor or criminal jurisdiction, and held that the same in that respect was not violative of the Constitution, this court, following the rule declared in *State ex rel. Ikard v. Russell, Judge, supra,* without a re-examination as to the correctness of such holding, follows the same.

2. Said act does not appear to be repugnant to section 59, art. 5, of the Constitution; it being a general law, having a uniform operation throughout the state. See citations under section 59 (148) art. 5, Constitution of this state (Williams' Ann. Const.).

The county and district courts have concurrent jurisdiction of certain civil actions. The plaintiff may elect as to which court as to such action he will proceed in against the defendant. In the district courts such cause will be tried before a jury of twelve but, if brought and prosecuted in the county court, the same action will be tried before a jury of six. As to every action tried before a jury in the county court, it is before a jury of six; likewise, as to every action tried before a jury in the superior court, it is before a jury composed of twelve members. The law operates uniformly over the entire state, applying to all persons alike under the same circumstances. That seems to meet the requirements of said section 59.

3. Is said act repugnant to section 46y of article 5 of the Constitution, forbidding the passage of any local or special law, authorizing the summoning or impaneling of grand or petit juries? Said act is neither a special nor a local law. *Coyle v. Smith,* 28 Okla. 121, 113 Pac. 944.

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4. That part of said act providing for misdemeanor cases to be tried in said court before a jury of six having been declared void as being repugnant to the provisions of the Constitution of the state (*Hill v. State*, 3 Okla. Cr. 686, 109 Pac. 291), it is insisted that all of said act relating to misdemeanor jurisdiction must therefore fall, as this court cannot assume that the Legislature would have incorporated in said act a provision conferring misdemeanor jurisdiction on such courts to be tried before a jury of twelve.

"Where a part of a statute is unconstitutional, that fact alone is not sufficient to authorize the courts to declare the remainder void, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the Legislature would have passed the one without the other." (*In re County Com'rs of Counties Comprising Seventh Judicial District*, 22 Okla. 435, 98 Pac. 557.)

In *Burks v. Walker, supra*, it is said:

"And when the condition of the courts and their dockets at the time of the framing of the Constitution is recalled, it can be readily understood why the framers of the Constitution did not undertake to fix by hard and fast rule the jurisdiction of the inferior courts of the state."

The superior courts were created in each county having a population of 30,000 and a city therein of 8,000 population. This was done on account of the congestion of the court dockets, with a view of clearing the same. It is a matter of common knowledge that in the large cities the prohibitory laws are difficult to enforce. This court, prior to that time, held that the violation of the prohibitory laws was a misdemeanor (*Ex parte Cain*, 20 Okla. 125, 93 Pac. '974), and in counties with large urban population the dockets were crowded, not only with civil and felony, but also misdemeanor, cases, especially cases involving the violation of the prohibitory laws. It is to be assumed that the Legislature passed this act for the purpose of expediting the trial of such cases, especially criminal causes.

In *Mattox v. State*, 115 Ga. 212, 41 S. E. 709, an act creating the city court of Valdosta was under consideration. In the opin-

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ion, applying the same rule as announced by this court in *Re County Com'rs of Counties Comprising Seventh Judicial District, supra*, it is said:

"* * * It cannot be said that the manner in which the trivial cases referred to above are to be tried was in any sense so connected with the general scope of the act that the court thereby created would not have been brought into existence by the Legislature without the provision which denies a jury trial in those cases involving trifling amounts. The legislative will and purpose manifested by the act, taken as a whole, is to provide a local court for the relief of the superior court in misdemeanor cases, and in civil cases where under the Constitution the superior court has not exclusive jurisdiction. The deprivation of trial by jury in cases involving $50 or less could not have been considered by the General Assembly as such an essential part of the measure creating the city court of Valdosta that it would not have passed the act if it had known that it had no constitutional power to make a provision having that effect a part of the act. The main purpose of the act was the creation of a court of the character above referred to. The manner of trial to be followed in that court in cases of trifling importance, embracing unquestionably a very small part of the cases falling within the jurisdiction of the court, was merely a matter of minor detail. To hold the section unconstitutional which takes away the right of trial by jury in suits for $50 or less would not in any material or substantial way disturb the general scheme of the act, for the effect of such a ruling would be simply to eliminate from the act the paragraph in question, and make applicable to the cases referred to in the paragraph the other provisions of the act in reference to trial by jury. No further legislation would be required, and the practice and procedure of the court would not be in any material respect altered. Viewing the act as a whole, we do not think that portion which, if valid, would have resulted in a deprivation of the right of jury trial in such a small and comparatively insignificant class of cases, when it is provided for all other classes of cases, and when the method and machinery for obtaining juries is provided, is such an essential part of the scheme of the act creating the court as that its withdrawal from the act would have the effect to render the entire act void. The effect of this ruling is to give to litigants in all cases in the city court of Valdosta the right to demand a trial by jury, or, in other words, to give litigants in that court, in suits involving $50 or less, the

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same rights with respect to jury trial as are provided by the act for litigants in other cases."

See, also, *Harper v. State,* 109 Ala. 28, 19 South. 857; *Trimble v. Commonwealth,* 96 Va. 818, 32 S. E. 786; *State ex. rel. Anderson v. Sullivan,* 72 Minn. 126, 75 N. W. 8; *State v. Duluth, G. & W. Co., etc.,* 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

Besides, the provision that all misdemeanor cases shall be tried by a jury of six men, instead of twelve, to be selected the same as juries in the district court, is contained in section 6 of the act creating the superior courts (chapter 14, art. 7, sec. 6, p. 183), whilst the misdemeanor jurisdiction is conferred upon said court by section 2 of said act, which provides:

"Every such court shall have and exercise concurrent jurisdiction with the district court, in all proceedings, causes, or matters, and concurrent jurisdiction with the county court in all civil and criminal matters, except matters of probate."

Section 6 provides:

"The procedure in said court [superior court] shall follow the procedure that is or may be provided for the district court. The juries for said court shall be selected in the same manner as juries for the district court, and the jury commissioners of all counties in which a superior court is created by operation of this act, whenever they meet to make jury lists for the district court, shall make an additional certified list of jurors in the same manner as for the district court and mark the same 'Jury List No. 3, for the Superior Court,' and shall deliver the same to the clerk of the superior court and said clerk and the sheriff of the county shall select from said list the jurors for the superior court in the same manner as the sheriff and clerk of the district court select jurors for the district court. Juries in said court shall be composed of the same number of men, of the same qualifications as in the district court, and all laws relative to juries and jurors for district courts shall be, and are hereby made applicable to the said superior courts; provided, however, that all misdemeanor cases shall be tried by a jury of six men, instead of twelve, to be selected the same as juries in the district court. Appeals from said court shall be taken to the Supreme Court of the state, and to the Criminal Court of Appeals of the state, in the same manner as is now or may hereafter be provided by law for taking appeals from the district court to said appellate courts."

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When we look at the entire act in the light of the history of its adoption, it can neither be assumed nor can it be made to appear from the act that the Legislature would not have passed said act containing section 2, as it now exists, conferring misdemeanor jurisdiction on said courts, with the proviso in section 6 as to six jurors for misdemeanor cases eliminated therefrom. *In re County Com'rs of Counties Comprising Seventh Judicial District, supra.*

The petition for a writ of *habeas corpus* will be denied.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

Ex parte LIGHTLE.

No. 3886. Opinion Filed June 11, 1912.

(124 Pac. 983.)

FORMER DECISION CONTROLLING. Same as that in **Ex parte Tom Anderson, ante,** 124 Pac. 980.

(Syllabus by the Court.)

Petition by Joe Lightle for a writ of *habeas corpus.* Denied.

Kistler, McAdams & Haskell, for petitioner.

Smith C. Matson, Asst. Atty. Gen., opposed.

WILLIAMS, J. On February 2, 1911, the petitioner, Joe Lightle, was convicted in the superior court of Muskogee county on an information charging the violation of the prohibitory laws of this state, and his punishment assessed at thirty days' confinement in the county jail and a fine of $250. A proceeding in error to review said judgment having been prosecuted in the Criminal Court of Appeals, on April 8, 1912, the same was affirmed.

Application is made for the discharge of said petitioner under writ of *habeas corpus* on the ground that the act of the Legislature creating said court is in violation of the Constitution of this state. All of said contentions have been determined by this

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court adversely to said petitioner in *Ex parte Tom Anderson, ante,* 124 Pac. 980.

The petition is therefore denied.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

Ex parte RIAL.

No. 3880. Opinion Filed June 11, 1912.

(124 Pac. 983.)

FORMER DECISION CONTROLLING. Same as that in **Ex parte Tom Anderson, ante,** 124 Pac. 980.

(Syllabus by the Court.)

Petition by Paul Rial for writ of *habeas corpus.* Denied.

Kistler, McAdams & Haskell, for petitioner.

Smith C. Matson, Asst. Atty. Gen., opposed

WILLIAMS, J. Under the authority of *Ex parte Tom Anderson, ante,* 124 Pac. 980, the petition for writ of *habeas corpus* is denied.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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Ex parte SPURLOCK.

No. 3889. Opinion Filed June 11, 1912.

(124 Pac. 983.)

FORMER DECISION CONTROLLING. Same as that in **Ex parte Tom Anderson, ante,** 124 Pac. 980.

(Syllabus by the Court.)

Original application by Lee Spurlock for writ of *habeas corpus.* Denied.

Kistler, McAdams & Haskell, for petitioner.

Smith C. Matson, Asst. Atty. Gen., opposed.

WILLIAMS, J. The facts in this case are identical with those in *Ex parte Tom Anderson, ante,* 124 Pac. 980. Under the authority of that case the petition is denied.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

RUSSELL *et al.* v. HARRISON, *Secretary of State.*

No. 4023. Opinion Filed June 12, 1912.

(124 Pac. 762.)

CONSTITUTIONAL LAW—Enactment—Initiative—"Will." The word "will," as used in section 1 of an act approved March 18, 1911 (Sess. Laws 1910-11, c. 107), entitled "An act amending section 2, art. 1, chapter 66 of the Session Laws of 1910," and providing "any citizen of the state may, within ten days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same, at which time he will hear testimony and arguments for and against the sufficiency of such petition," means "shall" and is mandatory, and, being addressed to a public official, excludes the idea of discretion.

(Syllabus by the Court.)

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Russell et al. v. Harrison, Secretary of State.

Original proceeding in mandamus by Campbell Russell and others against Ben. F. Harrison, Secretary of State. Writ granted, but withheld to permit compliance with views expressed.

Campbell Russell, for plaintiff.

Ben. F. Harrison, pro se.

Orville T. Smith, amicus curiae.

TURNER, C. J. On May 29, 1912, a petition was filed by Campbell Russell for himself and on behalf of 11,393 other citizens and qualified voters of the state, alleging in substance that the defendant, Ben. F. Harrison, is the duly elected, qualified, and acting Secretary of State of Oklahoma; that on April 25, 1912, petitioner filed with him as such an initiative petition No. 23, state question No. 38, signed by petitioner, and many other qualified voters of the state, which proposed an amendment to the Constitution of the state of Oklahoma, a copy of which was filed as "Exhibit A" to the petition; that on said day it became and was the duty of the defendant to proceed at once to examine the sufficiency of said petition, but that, disregarding his duty, defendant has failed and refused so to do; that defendant has postponed an examination or determination thereof until June 17, 1912, at which time it is his purpose again to refuse and continue so to do so as to defeat and postpone the right of the citizens and qualified voters of the state to vote upon said proposed amendment, and praying for an alternative writ of mandamus commanding the defendant to proceed at once to determine the sufficiency of said petition or to show cause, and for proper relief. On May 29, 1912, said writ was issued by the court as prayed. On June 4, 1912, came defendant, as Secretary of State, and showing cause, after admitting that said petition was filed as alleged, states that protest thereto was filed May 4th, and a hearing thereon set for May 28, 1912, at which time plaintiff appeared, but that defendant was unable to hear said protest for the reason that a hearing was in progress upon the protest against the sufficiency of an initiative petition filed prior thereto, which had been set for hearing May 14, 1912; that

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inasmuch as both hearings could not be had at the same time, defendant felt that precedence should be given to the hearing already in progress, and being advised and believing that he had authority, under section 2 of chapter 66 of Sess. Laws 1910, to use his discretion in setting the time for hearing such protest, provided the same be set for hearing not less than five days from the filing of protest, the hearing of the protest to initiative petition No. 23 was postponed until June 17, 1912; that plaintiff was present at the time of said postponement and offered no objection thereto; that the attorney protesting and the protesting parties were the same as those representing the parties protesting against the sufficiency of initiative petition No. 21, and said attorney requested that the hearing be postponed until some time in July, whereupon plaintiff objected, for the reason that he had several picnic engagements for the month of July; and that when June 17th was suggested plaintiff offered no protest. Further answering, he denies it to be his purpose or intention to postpone said hearing from time to time so as to defeat the ends of justice, and prays to be discharged. The return was insufficient, and the writ should run.

On the hearing in open court petitioner relied on an act entitled "An act to provide for carrying into effect the initiative and referendum powers, * * *" approved April 16, 1908 (Sess. Laws 1907-08, c. 44, art. 1), which provides:

"Sec. 6. Whenever an initiative petition or referendum petition shall be filed with the Secretary of State, he shall at once proceed to examine into its sufficiency. If any one desires to appear for or against it he shall receive testimony and arguments * * *"

—and insisted that "at once," as used in that connection, meant just what it said, and that it was the duty of the Secretary to proceed at once to examine into the sufficiency of the petition immediately on its filing. On the other hand, the Secretary relied on an act entitled "An act carrying into effect provisions relating to the initiative and referendum; * * * repealing sections 6, 7 and 16 of article one, chapter forty-four of the Session Laws of Oklahoma, 1907-08," approved March 17, 1910, which provides:

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"Sec. 2. When such original petition is filed in said office it shall be the duty of the Secretary of State to forthwith cause to be published in at least one newspaper of general circulation within the state, a notice setting forth the date of such filing. Any citizen of the state may, within ten days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same, whereupon the Secretary of State shall fix a day, not sooner than five days thereafter, at which he will hear testimony and arguments for and against the sufficiency of such petition"

—which repealed said act, and insisted that thereby he was given a discretion after protest filed to fix the date for the hearing which he had exercised by fixing June 17, 1912. Both were in error as to the law, and it is since conceded in the briefs that this latter act was amended by an act entitled "An act amending section 2 of article 1, chapter 66, of the Session Laws of 1910, the same being a bill entitled 'An act carrying into effect provisions relating to the initiative and referendum, * * *'" approved March 18, 1911, section 1 of which provides:

"When such original petition is filed in said office it shall be the duty of the Secretary of State to forthwith cause to be published in at least one newspaper of general circulation within the state, a notice setting forth the date of such filing. Any citizen of the state may, within ten days by written notice to the Secretary of State and to the party or parties, who filed such petition, protest against the same, at which time he will hear testimony and arguments for and against the sufficiency of such petition"

—and which is the governing statute here. In his brief petitioner, in effect, contended that, when the last sentence of said act said that "any citizen of the state may * * * protest against the same, at which time he will hear testimony and arguments for and against the sufficiency of such petition," the act meant just what it said, and that the word "will," as used in that connection, meant "shall," and that it was mandatory upon the Secretary of State to hear testimony and arguments for or against the sufficiency of such petition at the time of protest filed, leaving him no discretion in the premises to postpone said hearing. We think so too. The word "will" is frequently misused for "shall." This is noted by Webster's International Dictionary for 1907, where it is said:

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"In Ireland, Scotland, and the United States, especially in the southern and western portions of the United States, 'shall' and 'will' 'should' and 'would' are often misused, as in the following examples: 'I am able to devote as much time and attention to other subjects as I will (shall) be under the necessity of doing next winter, * * * I feel assured that I will (shall) not have the misfortune to find conflicting views. * * *'"

The last expression of the Legislature upon the subject was the act approved March 18, 1911, section 1, *supra,* of which amended section 2 of the act of March 17, 1910, by omitting the five days mentioned, and providing in effect that, at the time of the filing of the protest, the Secretary "will hear testimony and arguments for and against the sufficiency of such petition." The spirit of this legislation indicates the purpose to have immediate action in the premises by the Secretary. The word "will," as used in this connection, means "shall," and that the part of the last section quoted is mandatory, and it is the duty of the Secretary to proceed to an immediate hearing of testimony and arguments for and against the sufficiency of the petition. The word "shall," being mandatory, when addressed to a public official, excludes the idea of discretion. *In re O'Rourke,* 9 Misc. Rep. 564, 30 N. Y. Supp. 375. In contemplation of law, this hearing when begun is always open until finally concluded.

For the reason, however, that we believe the Secretary will conform to the views here expressed, the writ is withheld.

All the Justices concur, except HAYES, J., absent, not participating.

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FENTON v. BURLESON.

No. 1854. Opinion Filed June 25, 1912.

(124 Pac. 1087.)

1. **PROCESS—Service by Publication—Sufficiency of Affidavit.** An affidavit filed for the purpose of obtaining service by publication in which it is stated the defendant is a nonresident of the state of Oklahoma, and is a resident of the state of Indiana, without showing that service could not have been had upon the defendant within the state of Oklahoma, is insufficient to support service by publication.

2. **PLEADING—Motions—Judgment on Pleadings.** Where the material averments of plaintiff's petition are denied by the answer of the defendant and facts pleaded showing the same to be untrue, it is error to render judgment for plaintiff on the pleadings.

(Syllabus by the Court.)

Error from District Court, Tillman County;
J. T. Johnson, Judge.

Action by John T. Burleson against C. O. Fenton. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Wilson & Roc, for plaintiff in error.

McGuire & Mosier, for defendant in error.

DUNN, J. This case presents error from the district court of Tillman county. Plaintiff brought his action to secure the cancellation of a certain note and mortgage given by himself and wife to the Winne Mortgage Company, which had thereafter been transferred to and held by C. O. Fenton, trustee. The said note was in the sum of $1,440, of which sum plaintiff admitted having received $220.40, but denied having received the balance. An effort was made to secure service on the defendants by publication, and two affidavits for this purpose were filed. The defendant C. O. Fenton, trustee, alone appeared, and filed motion to quash, set aside, and hold for naught the summons and purported service

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had on the first affidavit for the reason that the same was not issued, served, and returned according to law, and was insufficient to confer jurisdiction on the court. This motion was by the court sustained, and plaintiff was given leave to amend, which was done. In the amended affidavit the only averment as to plaintiff in error is "that the defendant C. O. Fenton, trustee, is a nonresident of the state of Oklahoma, and is a resident of the state of Indiana," which is followed by a general averment setting forth the character of the action, and that the note and mortgage referred to had been duly assigned for value to the said C. O. Fenton, trustee. To this amended affidavit a motion to quash was likewise directed, but the same was denied by the court, to which an exception was saved, and this is one of the assignments of error in this court. That this affidavit was insufficient under the authorities there can be no doubt. Sections 5612 and 5613, Comp. Laws 1909, relating to service on nonresident defendants, provide that, before substituted service can be made, "an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication."

In the case of *Ballew v. Young*, 24 Okla. 182, 103 Pac. 623, 23 L. R. A. (N. S.) 1084, it is held:

"Where it is stated, in an affidavit to obtain service by publication, that a defendant is a nonresident of the state, and service cannot be had upon him within the state, and such affidavit is otherwise sufficient, it is not void or voidable because facts are not stated therein showing that plaintiff by the use of due diligence was unable to make service of summons upon the defendant."

The statement contained in the affidavit that "service cannot be had upon him within the state" is just the essential qualification lacking in the affidavit before us. This affidavit states that the said defendant is a nonresident of the state of Oklahoma, and is a resident of the state of Indiana, but it does not state, nor is there any fact averred from which it can be inferred, that personal service upon him could not have been made within the state. The defendant might have been a nonresident of the state of Oklahoma, and a resident of any other state, and yet he may have

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been personally present in the county all of the time during which plaintiff was seeking to get service, and may have been known to have been so present not only to the plaintiff, but to the sheriff, and all the parties interested. This condition must be negatived to give jurisdiction. Speaking to this proposition, the Supreme Court of the Territory of Oklahoma in the case of *Cordray v. Cordray,* 19 Okla. 36, 91 Pac. 781, said:

"This statute was adopted in this territory from the state of Kansas, and has been passed upon repeatedly by that state. Among the early cases is the case of *Shields v. Miller,* 9 Kan. 390, which was a foreclosure case. The affidavit in that case was somewhat of the same form and substance as the one at bar, and the court in passing upon the case makes the statement that from anything that appeared in the affidavit the defendant may have been in the county where the action was brought or even upon the land in controversy, when the affidavit was filed, and therefore might easily have been served with summons personally. The Supreme Court further says that: 'The affidavit is the foundation upon which jurisdiction is obtained. The plaintiff has no power or authority to obtain service by publication until after he has filed the proper affidavit. Without the affidavit, the attempted service by publication is a nullity, and without valid service every subsequent proceeding, including the judgment, the execution, order of sale, and deed, must necessarily be void.'"

Under these circumstances, service by publication is not permissible, for it is only where personal service cannot be had that service by publication is authorized. Whether the original affidavit was sufficient to be the subject of amendment we do not say, but the attention of plaintiff is respectfully called to the following authorities: *Pierce et al. v. Butters et al.,* 21 Kan. 124; *Harris v. Claflin,* 36 Kan. 543, 13 Pac. 830; *Long et al. v. Fife,* 45 Kan. 271, 25 Pac. 594, 23 Am. St. Rep. 724; *Garrett v. Struble,* 57 Kan. 508, 46 Pac. 943; *Licberman v. Douglass et al.,* 62 Kan. 784, 64 Pac. 590.

Plaintiff's petition averred that he was in peaceable possession of the premises, the title and right in and to which he desired to have quieted; for the reason that of the $1,440 for which he had given his note and mortgage he had received but $220.40, which he offered to return. To this petition, under order of the

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court, defendant filed answer in which he denied every allegation in the petition contained, except the execution of the note and mortgage, the assignment of the same, and the payment of $220.40 to the plaintiff, and averred that "prior to the commencement of this action the plaintiff was paid the full amount of said note and mortgage, to wit, the sum of $1,440."

Plaintiff, defendant in error in this court, has filed no brief to indicate upon what theory the trial court proceeded in rendering judgment in his favor, and in view of the record as it presents itself to us, and the assignments of error contained in the brief of counsel for defendant, plaintiff in error here, the judgment of the trial court was erroneous, and should be reversed, which is accordingly done, and the case remanded with instructions to set the same aside.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent, and not participating.

SMITH v. WOODS *et al.*

No. 1858. Opinion Filed June 25, 1912.

(124 Pac. 1088.)

PARTNERSHIP—Fictitious Name—Publication — Action. Paragraphs 3901, 3903, Wilson's Rev. & Ann. St. 1903 (sections 5023, 5025, Comp. Laws 1909), providing that a partnership transacting business in this state under a fictitious name shall file a certificate with the clerk of the district court stating the names of the members of the partnership in full, and publish the same for four consecutive weeks, and that persons doing business as a partnership contrary to the provisions thereof shall not maintain any action on account of any contracts made or contracts had in their name in any court in this state until they have first filed their certificate and made the publication required, is mandatory, and must be complied with literally, and the publication required must be had before any such action can be brought or maintained in the courts.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

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Smith v. Woods et al.

Action by William P. Woods and another against Herbert E. Smith. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with instructions.

Herbert E. Smith, pro se.

M. A. Holcomb and *John H. Clapp,* for defendants in error.

DUNN, J. This case presents error from the district court of Okmulgee county, and was brought by William P. Woods and C. George Kirschbaum, as plaintiffs, against Herbert E. Smith and others. The action was to foreclose a mechanic's lien. To the petition filed in which they averred that they were partners doing business under the firm name and style of East Side Lumber Company of Okmulgee, state of Oklahoma, the defendant Smith filed answer, in which he pleaded:

"That he admits that the plaintiffs are a partnership and compose the firm known as the East Side Lumber Company, and, under such fictitious name, were doing business at the time and place set forth in the petition herein, and alleges that the subject of this action, if any exists, is in the East Side Lumber Company, a copartnership with fictitious name, and that this court is without jurisdiction to try and hear this action, and the plaintiffs are without any right to bring and maintain the same as by them alleged, and this defendant avers that the East Side Lumber Company, a partnership, is not of the kind which the law of Oklahoma does not require to file the certificate provided by paragraph 3902, Wilson's Rev. & Ann. St. 1903 (section 5024, Comp. Laws 1909), and that plaintiffs were, at the beginning of this case, and for a long time prior thereto, transacting, carrying on, and conducting business in the state of Oklahoma, Okmulgee county, under the fictitious name of the East Side Lumber Company, which name or designation did not and does not disclose and show the name of the persons interested as partners, in such business, and that said plaintiffs had not filed the certificate and made the publication required by paragraph 3901, Wilson's Rev. & Ann. St. 1903 (section 5023, Comp. Laws 1909) for Oklahoma, when the alleged indebtedness was contracted, and its alleged right of action accrued, and when and at the time of instituting this action."

On the filing of this answer, and, to wit, on the 9th day of July, 1909, the trial court granted plaintiffs 60 days to plead, and

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on the 11th day of September, 1909, they filed their reply in which, among other things, they alleged:

"That they, as a partnership, in the name of the East Side Lumber Company did, on the ——— day of July, 1909, file a certificate as provided in paragraph 3902, Wilson's Rev. & Ann. St. 1903 (section 5024, Comp. Laws 1909), which certificate designates and shows the names of said partnership doing business under the fictitious name of the East Side Lumber Company to be William P. Woods and C. George Kirschbaum; that said certificate was filed with the clerk of the district court of Okmulgee county, Okla., on the ——— day of September, 1909, and proof of the publication of the same was duly filed in said district court of Okmulgee county, state of Oklahoma, showing same was published as required by said paragraph 3902, Wilson's Rev. & Ann. St. 1903 (section 5024, Comp. Laws 1909), and certificate made and published as required in paragraph 3901, Wilson's Rev. & Ann. St. 1903 (section 5023, Comp. Laws 1909)."

The first question raised by the defendant is that, under the statutes of Oklahoma, the plaintiffs were not entitled to maintain their action, that they were not the proper parties plaintiff, and also the action could not be commenced or maintained until after the certificate referred to had been filed and the advertisement made. Paragraph 3901, Wilson's Rev. & Ann. St. 1903, being section 5023, Comp. Laws 1909, reads as follows:

"Except as otherwise provided in the next section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the district court of the county or subdivision in which its principal place of business is stated, a certificate, stating the names in full of all the members of such partnership, and their places of residence, and publish the same once a week for four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county."

Paragraph 3903, Wilson's Rev. & Ann. St. 1903, being section 5025, Comp. Laws 1909, provides:

"The certificate filed with the clerk of the district court provided in paragraph 3901 (sec. 5023) must be signed by the partners and acknowledged before some officer authorized to take acknowledgments of conveyances of real property. Persons doing business as partners, contrary to the provisions of this article, shall

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not maintain any action on or on account of any contracts made or transactions had in their partnership name in any court of this state until they have first filed the certificate and made the publication herein required: Provided, however, that if such partners shall at any time comply with the provisions of this article, then such partnership shall have the right to maintain an action in all such partnership contracts and transactions entered into prior as well as after such compliance with this article, and the disabilities heretofore imposed as partnerships by said article, for a failure to comply therewith, are hereby removed and made to conform to this section."

Under the pleadings in this case, it is admitted that the East Side Lumber Company was a partnership, and that the name adopted was a fictitious one, and did not show the names of the persons interested as partners in the business, and, furthermore, that the advertisement provided for was not made prior to the commencement of the action, and not until after a demurrer and the answer had been filed to plaintiffs' petition. The question is therefore: Was this a sufficient compliance with the requirements of the act?

Statutes of the foregoing and similar import obtain in several states, and the question here presented has in a number of instances been before the courts for consideration. The statute of Ohio on this subject reads that "any person doing business contrary to the provisions of this act shall not maintain an action on account of any contract made or transaction had in their partnership name * * * until they have first filed the certificate, and made the publication herein required."

In the case of *New Carlisle Bank v. Brown,* 11 Ohio Cir. Ct. R. 77, on the question of whether the word "maintain," as used therein, includes the beginning of an action, the Circuit Court of the Second Circuit of that state said:

"It is contended by the plaintiff in error that the word 'maintain' in said section is not synonymous with 'begin' or 'commence,' but that it is used rather in the sense of 'carry forward'; that an action may be commenced notwithstanding the noncompliance with the conditions prescribed, but may not be pursued to final judgment until said conditions are fulfilled. This seems to us an artificial and strained construction. We think the word means

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to begin and prosecute the action to final judgment. Such is the interpretation adopted by the Supreme Court of California in the construction of an act of that state of which our statute is a substantial copy, and it is the more natural and reasonable definition. *Byers et al. v. Bourret*, 64 Cal. 73, 28 Pac. 61."

The Supreme Court of California in the case referred to—*Byers et al. v. Bourret*—in the syllabus said:

"A partnership doing business under a designation not showing the names of the partners cannot commence an action until they have filed the certificate and made the publication required by the Civil Code. The commencement of an action is a part of maintaining it."

In the consideration thereof the court said:

"In this case it was incumbent on the plaintiffs to have shown that the certificate had been filed and published once a week for four successive weeks before the commencement of the action. We find the law very plainly written, and must hold accordingly."

See, also, *Sweeney et al. v. Stanford*, 67 Cal. 635, 8 Pac. 444; *North v. Moore et al.*, 135 Cal. 621, 67 Pac. 1037; *Heegaard et al. v. Dakota Loan & Trust Co.*, 3 S. D. 569, 54 N. W. 656; *Swope & Son v. Burnham, etc., Co.*, 6 Okla. 736, 52 Pac. 924; *Choctaw Lumber Co. v. Gilmore*, 11 Okla. 462, 68 Pac. 733.

In the case of *Choctaw Lumber Co. v. Gilmore, supra*, it appears from the statement of facts that on October 9, 1901, the plaintiff, the Choctaw Lumber Company, filed and published a certificate stating the names and places of residence of the members of the partnership, and on the same day began its action in the district court against certain parties defendant. A motion was made to dissolve the temporary injunction granted because the plaintiff had not filed and published the certificate required by the statutes above noted. After bringing the suit, the plaintiff sold and assigned its interest therein to one McKee, who filed his application in the case to be substituted plaintiff, setting forth that he had purchased the rights of plaintiff. The same question was raised in that case as in this, and Justice McAtee, who prepared the opinion for the court, said:

"There is no room for interpretation or construction, and it is not within the province of the court to undertake by some adroit interpretation, to disregard or to destroy the force of provi-

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sions the statute expressly, specifically, definitely, and emphatically stated and undoubtedly intended for the protection of the citizenship of the territory which transacts business with any partnership doing business under a fictitious name. The certificate provided for by the statute was filed in attempted conformity thereto on the 9th of October, the same day upon which the action was begun. The plaintiffs were not qualified or entitled to begin the action until they had made the publication herein required, which is that 'the certificate shall be published once a week for four consecutive weeks in a newspaper published in the county, if there be one.' * * * They had no right to begin the action at the time they did, and the substitution of McKee availed them nothing since he could have acquired no greater right than the persons and firms constituting 'The Choctaw Lumber Company.' They had no right to maintain the action on the 9th of October, and they could not thereafter initiate the right to sustain that action by subsequent sale and assignment to one of their number."

The purpose of the act is well stated by Judge Bierer in the *Swope v. Burnham, etc.*, case, *supra*. It is to put the parties who are doing business with a fictitious partnership upon the same plane as the members of the concern in so far as information may be necessary to know with whom they are dealing. Parties doing business as a partnership under a fictitious name may be one set of individuals today and another set tomorrow, and people transacting business with it grope in the dark when the time comes to assert their rights in court. The sanction which the statute carries with it is contained in the denial of the right of persons doing business as partners contrary to the provisions of the act to maintain any action on accounts or contracts made or transactions had in their partnership name until it has first filed the certificate and made the publication required. The law is plain, means what it says, and plaintiff lacked any standing in court after its right was challenged.

Under the circumstances, the judgment of the trial court must be reversed, and the cause remanded, with instructions to dismiss the same.

TURNER, C. J., and KANE, and HAYES, JJ., concur; WILLIAMS, J., absent, and not participating.

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LYNDE-BOWMAN-DARBY CO. v. HUFF.

No. 1875. Opinion Filed June 25, 1912.

(124 Pac. 1085.)

1. **APPEAL AND ERROR—Review—Trial by Court.** Where, on the trial of a cause to a court without a jury, the evidence reasonably sustains the decision rendered, this court will not reverse it.

2. **TRIAL—Trial by Court—Findings.** Overruling a demurrer to plaintiff's evidence on the trial of a cause to a court without a jury does not preclude it at the conclusion of all of the evidnece from finding, on the whole case, that plaintiff had failed to sustain his cause.

3. **SAME—Right to Open and Close—Waiver.** Where counsel on the trial of a cause failed at the time to demand the right to open and close the argument, error, if any, committed by the trial court in the procedure adopted is waived.

(Syllabus by the Court.)

Error from District Court, Muskogee County; John H. King, Judge.

Action by the Lynde-Bowman-Darby Company against J. L. Huff. Judgment for defendant, and plaintiff brings error. Affirmed.

Roach & Bradley, for plaintiff in error.

J. A. Anderson, for defendant in error.

DUNN, J. This case presents error from the district court of Muskogee county. The suit was originally instituted in the United States Court for the Western District of the Indian Territory at Muskogee on the equity side of the docket by plaintiff in error, as plaintiff, against the defendant to set aside a certain decree entered in that court vesting title to the land in controversy in defendant on the ground that the said decree was obtained in fraud of the right and title of plaintiff to the said land. Prior to the filing of this suit, and in 1905, Thomas Lucky had executed and delivered to the defendant, J. L. Huff, an instru-

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ment which, on its face, appeared to be a warranty deed for the land. Several months after the execution of the said instrument, Thomas Lucky with Sarah Lucky, his wife, brought suit against the defendant to have the said deed declared a mortgage, and as such canceled for want of consideration. The issues in the case were made up, and the same was by the court referred to a master in chancery. The evidence was taken, and on April 30, 1907, the master reported in favor of the plaintiff. In the said action Thomas Lucky was represented by Messrs. De Roos Bailey and Thomas H. Owen, while the defendant was represented by P. C. West, Esq. November 22, 1906, and prior to the report made by the said master, Thomas Lucky sold and conveyed the property in controversy to his wife, Sarah Lucky, who, on February 1, 1907, which was also prior to the report made by the said master, and while the suit was still pending, sold the same to the plaintiff, whose deed was filed for record in the proper office on February 20, 1907. After the master had made his finding and his report had been filed, and on October 14, 1907, the said plaintiffs, Thomas Lucky and Sarah Lucky, and J. L. Huff entered into a contract looking to a settlement of the litigation. This it is claimed by counsel for plaintiff was done without the knowledge or consent of the plaintiff in this cause, and without the knowledge or consent of the then attorneys for the Luckys, and counsel who had represented Huff from the institution of the suit was supplanted by his present counsel. The contract entered into by the said parties stipulated for payment of $500 to the Luckys and the assumption of a mortgage of $900, and the dismissal of the action. A decree based thereon was drawn by counsel called into the case by the defendant, predicated upon this contract, under which the land in controversy was secured to the defendant Huff. After the disposition of the cause the plaintiff herein filed a motion to interplead, which was denied. Thereafter, and on the 21st day of October, 1907, this plaintiff filed in the United States Court for the Western District of the Indian Territory, sitting at Muskogee, its complaint in equity to which, after demurrer was filed and overruled, defendant filed answer setting up a general denial, and on these issues

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the cause was tried at the January, 1910, term of the district court in and for Muskogee county, Okla., to which it had been transferred after statehood. At the conclusion of plaintiff's testimony, the defendant interposed a demurrer which was by the court overruled, and the defendant then introduced his testimony and the plaintiff its rebuttal, and upon the conclusion thereof defendant filed a paper which he denominated, "Motion for Nonsuit," which demanded judgment in defendant's favor for the reason, among others, that the plaintiff had failed to establish fraud in connection with the settlement of the suit between Thomas and Sarah Lucky and J. L. Huff, or in the signing of the stipulation on which the said decree was entered.

Plaintiff makes seven assignments of error in this court, which may be reduced to three: First, that the court erred in rendering its judgment finding that plaintiff failed to establish fraud in connection with obtaining the decree; second, that the court erred in rendering its judgment in favor of the defendant upon the so-called motion for nonsuit, for the reason that, at the conclusion of plaintiff's testimony in chief, the court had overruled his demurrer to plaintiff's evidence; third, that the court erred in rendering its judgment upon the so-called motion for nonsuit after the introduction of the testimony on all sides, for the reason that the interposition of the said motion deprived the plaintiff of opening and closing the argument of the said cause upon its merits.

In addition to the able briefs filed by counsel in this cause, the court has had the benefit of an oral argument, and a careful consideration of the contentions made by counsel at that time, as well as in their briefs, and an examination of the record has led us to the conclusion that sufficient grounds have not been shown to justify us in reversing the finding, judgment, and decree of the trial court. Counsel for plaintiff in their brief argue that scrutiny of the record by this court, removed as it is from close personal acquaintanceship with the more or less prominent parties who are connected with the perpetration of the fraud charged, will in their judgment result in a different conclusion from that of the trial court.

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The case was tried to the court without a jury, and an argument contained in the brief of counsel for plaintiff is that the trial court was acquainted with the different parties who had been participants in the transactions out of which the controversy grew, and by reason of this acquaintanceship and their prominence was deterred from doing its duty. There is in our judgment no evidence to support such a contention, and, if the statement is true that the court did know all the parties, it was in a better position to pass upon the credibility of the witnesses who appeared before it than is this court with but the naked record. We cannot in appealed cases be triers of disputed facts or determine the credibility of witnesses who render conflicting evidence. The best we can do is to scan the record, and from it say whether there is evidence reasonably tending to support the decision of the trial court; if there is, the matter is all at an end with us, and on this point the judgment is final.

We are not able to see that any fraud was committed on plaintiff by the parties to the suit settling it. Plaintiff knew they could do this when it bought the land during the time they were litigating about it. It expected to secure the benefit of a favorable decision for the Luckys, and that it did not is but another exemplification of the truth of the adage that "the best laid plans o' mice and men gang aft aglee," but we cannot see that in this instance it was the result of fraud on the part of this defendant, and so on this point we must agree with the trial court.

The second proposition raised, that the court erred when it sustained defendant's so-called motion for nonsuit after it had overruled a demurrer to plaintiff's evidence, is without merit. The action of the court at the conclusion of the trial was no more nor less than a finding that, on the whole evidence, the defendant, and not the plaintiff, was entitled to recover. The fact that the court had overruled a demurrer to plaintiff's evidence in no wise precluded it from finding for defendant, if, after hearing the whole case, it concluded plaintiff had not sustained its case by a preponderance of all the evidence.

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As to the third assignment, it appears that the procedure adopted on the so-called motion for nonsuit resulted in giving counsel for defendant the opening and closing of the argument. An inspection of the record does not disclose that counsel for plaintiff requested the court for the right to open and close at the time when the motion was presented. This was necessary in order that counsel might avail himself of this point in this court. He could not sit by and permit his adversary to open and close, taking chances on the result, and then, finding it adverse to him, predicate error upon it. He should have demanded the right if he claimed it, and on its denial saved an exception and presented it to the trial court in a motion for new trial. Otherwise it is waived, even if error was committed.

Having carefully considered, therefore, all of the contentions of counsel, and finding no error in the record, the judgment and decree of the trial court is affirmed.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

BAUMLE v. VERDE.

No. 1881. Opinion Filed June 25, 1912.

(124 Pac. 1083.)

1. **TRIAL—Instructions—Objection.** An objection to oral instructions that the "defendant excepts to the giving of each instruction" is sufficient to preserve for review errors therein.

2. **BREACH OF MARRIAGE PROMISE—Exemplary Damages.** The law in reference to the damages recoverable in an action for breach of promise of marriage is analogous to that in actions for torts, and exemplary damages may be awarded upon like grounds.

3. **SAME.** In an action for damages for breach of a promise of marriage, the court instructed the jury that if it found that defendant made a contract to marry, and thereafter broke the same, it might award to plaintiff such an amount of damages, aside from the actual damages, in the nature of punitive or exemplary damages as it might think proper, under all of the circumstances in the case. **Held** error; under section 2887, Comp. Laws 1909, exemplary or punitive damages are allowable only where the defendant has been guilty of oppression, fraud, or malice, actual

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or presumed, and an instruction which ignores these elements and allows the jury to return a verdict for exemplary or punitive damages in any event on the breach of the contract is error.

4. **SAME—Evidence.** On the trial of an action for breach of promise, any evidence, written or oral, tending to shed light upon the issues of the cause and which will tend to disclose the actual relationship of the parties in reference thereto is admissible.

(Syllabus by the Court.)

Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by Emma Verde against Louis Baumle. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Woods & Miley, for plaintiff in error.

Crossan, Lockridge & Heckaman, for defendant in error.

DUNN, J. This case presents error from the superior court of Pottawatomie county. October 12, 1908, defendant in error as plaintiff filed her amended petition in the district court of the said county in which she alleged that the defendant, Louis Baumle, and the plaintiff, on or about October 8, 1907, at Chicago, Ill., made and entered into a verbal contract of marriage; that defendant represented himself to be possessed of considerable wealth and influence and able to provide a comfortable home and suitable social position for the said plaintiff as his wife; and that he was at that time possessed of real property of the reasonable value of $50,000. That the plaintiff was a widow of marriageable age, and relied upon defendant's promises and made preparations to marry him; that, after all of the arrangements had been completed, the said defendant, without reason or explanation, refused to carry out his agreement; that plaintiff has at all times since the date of the said promise been ready and willing to marry the said defendant, but that the said defendant, though often requested, has refused to perform and fulfill his promise of marriage. That by reason thereof the plaintiff has suffered much pain and humiliation, blighting of affections, and embarrassment

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of social position, and has undergone great mental anguish and permanent physical distress, to her damage in the sum of $10,000. To the said petition defendant filed for answer a general denial. Thereafter, and on September 18, 1909, the said cause was, on order of the judge of the district court, transferred to the docket of the superior court in and for the said county, and, on the issues made by the pleadings, the cause came on for a trial before a jury, which, after hearing the evidence of all parties, returned a verdict in the sum of $4,000, on which judgment was rendered by the trial court. After motion for new trial was filed and denied, the cause was regularly lodged in this court for review.

Several assignments of error are presented by counsel for defendant, only one of which, relating to a certain instruction given, in our judgment is of substantial merit. The court instructed the jury orally. At the conclusion of the charge, counsel for defendant made the following objection:

"Defendant excepts to the giving of each instruction, and excepts to the court's refusing to give the instruction requested at the time."

Counsel for plaintiff contend in their brief that the language of this exception is not sufficient to save and present for the consideration of this court any error which may have been committed by the trial court, in the giving of any of the instructions. In this objection we are not able to concur. In the case of *Kansas Pac. Ry. Co. v. Nichols, Kennedy & Co.*, 9 Kan. 235, 12 Am. Rep. 494, the objection taken to the instructions was substantially the same as that urged in the case at bar. The court in the syllabus said:

"A general exception to a whole charge is insufficient if any portion of the charge is correct; but, where the record of the exceptions reads as follows, to wit, 'To the giving of which instructions, and to each and every portion thereof, said defendant by its counsel then and there duly excepted,' the Supreme Court will presume that exceptions were duly taken to each and every portion of the charge separately. Such has been the uniform practice of this court."

See, also, *Lorie v. Adams*, 51 Kan. 692, 33 Pac. 599.

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The exception here made is to the giving of *each* instruction, and this in our judgment was sufficient. The instructions to which counsel for defendant direct their complaint read as follows:

"You are instructed that if you find from the evidence that the defendant, in making this contract, if you find that he did make one, acted in bad faith, or if you find that he broke his contract or agreement, if you find that he did make one, then you may award to the plaintiff such an amount of damages, aside from any actual damages assessed in the nature of punitive damages or exemplary damages, as you think will be proper under all the circumstances in the case."

And to the following instruction:

"You are further instructed that in arriving at the amount of damages, which you may award the plaintiff, if you find for the plaintiff in this case, you may consider all the circumstances in the case, and, if you find for the plaintiff, give her such an amount of damages as will compensate her in the manner already explained to you, and if you find any punitive damages should be awarded, then assess to the plaintiff such punitive damages as you think proper, and the sum of all awarded must not exceed the sum of $10,000."

The objection to the foregoing instructions is that the court not only told the jury that it might allow exemplary damages if they found the defendant acted in bad faith in making the contract, if one was made, but went further and told the jury, if they found merely that defendant broke his contract or agreement, they might on that account alone award exemplary or punitive damages, and this latter clause it appears was without reference to whether the defendant entered into the contract in good or bad faith or was guilty of any fraud or malice either in making or in the breach thereof. It is insisted that this instruction was not cured by any of the other instructions given, but the injury done was accentuated by the language used in the second instruction, in which the jury was directed, if it found any punitive damages should be awarded, to assess to the plaintiff such as it might think proper, except the sum of all awarded must not exceed $10,000.

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Section 2906, Comp. Laws 1909, provides that "the damages for the breach of a promise of marriage rest in the sound discretion of the jury." While the action for breach of promise of marriage is one which has its inception in the violation of an obligation growing out of a contract, the authorities have, since a very early date, very generally treated the action as one carrying with it, as to damages, the elements of a tort. *Johnson v. Travis,* 33 Minn. 231, 22 N. W. 624; *Glasscock v. Shell,* 57 Tex. 215; *Kelley v. Highfield,* 15 Ore. 277, 14 Pac. 744; *Thorn v. Knapp,* 42 N. Y. 474, 1 Am. Rep. 561; *Kniffen v. McConnell,* 30 N. Y. 285. See, also, 5 Cyc. 1021, and cases cited under note 78, and 1 Sedgwick on Damages (8th Ed.) sec. 370.

The rule generally accepted by text-writers and courts is stated by the Supreme Court of Minnesota in the case of *Johnson v. Travis, supra,* to be as follows:

"The law as to damages in this class of actions is exceptional, being in some respects analogous to the rules prevailing in actions for torts; and exemplary damages may be awarded upon like grounds as in actions of the latter class." (Citing authorities.)

The statutory rule of this state under which a jury is authorized, in addition to the actual damages, to give damages for the sake of example and by way of punishing a defendant, is contained in section 2887, Comp. Laws 1909, and it applies to those cases "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed."

The rule as announced by the Supreme Court of Michigan in the case of *Goddard v. Wescott,* 82 Mich. 180, 46 N. W. 242, is as follows:

"While exemplary damages may be recovered in a suit for breach of promise to marry as a part of the general damages, in a proper case, and without specially pleading the facts warranting the allowance of the same, it must appear that there has been something more than a refusal, without sufficient legal excuse, to carry out the contract, before such damages can be recovered."

In the case at bar the plaintiff does not plead any facts showing that defendant was guilty of "oppression, fraud, or malice, actual or presumed," and in our judgment there is no evidence to support a verdict for damages with these elements as a basis.

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The parties had both been married before. Defendant lived in the city of Shawnee, Okla. Plaintiff was employed as a cashier in a store in Chicago, Ill. After becoming acquainted by correspondence, defendant visited Chicago for the purpose of meeting plaintiff, and remained in the city about a week or ten days, which was the period of their personal intercourse during their courtship. The balance of their intercourse was through correspondence, which covered several months. Concerning the treatment of her, plaintiff testifies that, after defendant had been in Chicago a few days, he asked her, "What do you think of me?" and to which she replied, "I like you." Plaintiff, testifying, then said:

"He was a very respectable man; I didn't think at the time he was this character of man; and he ask me a lot of more of interrogations, and I said, 'You have character too, for I saw it in your letters,' and every letter he wrote was nice as could be, and I thought we could be happy together."

—and:

"I always had a good feeling for the man, from the first that I saw his picture I studied it for about twenty minutes, and I knew that I was not a child any more, but if he was good, and through his letters I saw that he was not talking nonsense like young couples do, and that he was a respectable man and never mentioned any wrong thing and seemed to be well satisfied."

It appears that the defendant wrote plaintiff several letters after leaving her in Chicago, at which time he had, as the jury found, agreed to marry, and then without any explanation ceased to write, and did not answer the letters which she wrote to him. Herein, in our judgment, was simply a refusal on the part of the defendant, without sufficient legal excuse, to carry out the contract which he had made, and this, within the holding of the Supreme Court of Michigan, in the case of *Goddard v. Westcott, supra*, is not a sufficient basis to support exemplary damages.

The jury was instructed, as we have seen, if it found that defendant broke his contract or agreement, if it found that he made one, then it could award to the plaintiff punitive or exemplary damages such as it might think proper under all of the circumstances of the case. This would allow exemplary and

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punitive damages in every case where plaintiff could recover. Under the statute with reference to the measure of damages recoverable in this character of a case, and the elements necessary to support a finding of exemplary damages, this instruction was error.

The other objections which are urged relate to the admission of evidence and are, in our judgment, without merit. Plaintiff is entitled to have introduced on the trial of this cause all evidence showing communications between herself and the defendant which will assist in presenting her side of the controverted propositions, and we are not able to say that the letters to which objections are urged do not tend, at least to some extent, to throw light upon the situation.

The judgment of the trial court is therefore accordingly reversed, and the cause remanded, with instructions to set the verdict and judgment aside and grant defendant a new trial.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

WOLCOTT v. SMITH *et al.*

No. 1893. Opinion Filed June 25, 1912.

(124 Pac. 970.)

1. **EJECTMENT—Recovery for Improvements.** A judgment for the value of improvements made by an unsuccessful defendant in an action in the nature of ejectment cannot be allowed in that action, but recovery, if had at all, must be had under the provisions of sections 596-602 (sections 4794-4800) art. 25, c. 66, Wilson's Rev. & Ann. St. 1903; sections 6128-6134, Comp. Laws 1909.

2. **SAME—Procedure.** Application for the benefit of this act may be made by claimant on a return of the mandate of the Supreme Court in the action of ejectment.

(Syllabus by the Court.)

Kane, J., dissenting.

Error from District Court, Hughes County; John Caruthers, Judge.

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Wolcott v. Smith et al.

Action by Charles E. Wolcott against I. Smith and H. M. Brazel. Judgment for defendants, and plaintiff brings error. Reversed in part and affirmed in part.

Crump, Rogers & Harris and *J. Ross Bailey,* for plaintiff in error.

J. L. Skinner, for defendants in error.

DUNN, J. This case presents error from the district court of Hughes county, and is in the nature of ejectment brought by plaintiff in error as plaintiff against the defendants to establish title and recover possession of a certain tract of land. With it is joined a claim for damages and for rents and profits. To the petition defendants filed answer, in effect a general denial, and that they were not in the unlawful possession of the lands. The trial was had to the court without a jury, and judgment was rendered in favor of plaintiff finding him the owner and entitled to the possession of the land, and allowing him rent in the sum of $35, against which the court allowed on evidence received over objection of plaintiff the sum of $191 for improvements, and rendered judgment for plaintiff for the possession, but held that he would not be entitled thereto until he had paid the defendants the sum of $156, being the difference between the value of the improvements and the rent. After denial of a motion for new trial, plaintiff lodged the cause in this court for review, assigning as error the admission of evidence, under the pleadings, of the value of the improvements made.

The defendants against whom the judgment for possession and for rent was rendered took no exception thereto. The sole question presented on this appeal is, first, the right of the defendants to offer the evidence showing the character of improvements and their value without having pleaded the same; and, second, whether the character of possession held by the defendants was such as would entitle them to recover for the improvements which they had placed upon the land. An adverse decision to the defendants on the first question will eliminate the other from our consideration for the reason that, if the evidence was inadmissi-

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ble and the issue was not triable in the case, the rights of the parties could not be determined thereon. It is contended by counsel for defendants that the evidence was admissible on the theory that, their answer being a general denial, the doctrine laid down in the case of *Hurst v. Sawyer*, 2 Okla. 470, 37 Pac. 817, and several Kansas cases to which our attention is called, that "in an action of ejectment, all defenses, legal and equitable, may be proven in evidence under a general denial," applies to recovery for improvements placed on the land in good faith by the defendant while holding the same as an occupying claimant. If this doctrine applies, our attention has been called to no case, and a diligent search has failed to discover one, wherein a claim for improvements is held to be an equitable defense and subject to be established under a general denial. The rule at common law was that the rightful owner of land was under no duty or obligation to pay for improvements, the making of which he had not authorized, notwithstanding the same were made in good faith by an occupant who supposed he had a lawful right in and to the land. The rule of the civil law, however, permitted one who made improvements on land of which he was in possession under a *bona fide* belief that he was the owner, to recover for the same before being ousted and compelled to yield possession. In time courts of equity modified the rigidity of the common law, and permitted such occupant to recoup the value of his improvements against the rents and profits. If the owner claimed no rents and profits, the adverse claimant could obtain no compensation for his improvements, and there was no recovery for the excess value of his improvements over the rents and profits. The courts of equity, however, subsequently required a party who recovered property from another, which had been improved at his expense, to account to him for the value thereof on the doctrine that he who sought equity must do equity. Warvelle on Ejectment, sec. 546. This remedy has in certain cases been still further enlarged by statute in a number of the states so as to enable parties claiming the benefit of improvements made in good faith to recover therefor.

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Under subdivision 6 of paragraph 4287, Wilson's Rev. & Ann. St. 1903 (section 5623, Comp. Laws 1909), plaintiff may unite in the same petition a claim to recover real property with or without damages for the withholding thereof and for the rents and profits of the same. Such is the action which is here prosecuted, and the rule is that plaintiff must recover, if at all, upon the strength of his own title, rather than upon any defect in that by which the defendant claims. Under paragraph 4788, Wilson's Rev. & Ann. St. 1903 (section 6122, Comp. Laws 1909), it is made sufficient for the plaintiff to state in his petition that he has a legal or equitable estate in the land and is entitled to the possession thereof, and that the defendant unlawfully keeps him out of the same. On the filing of such a petition, paragraph 4789, Wilson's Rev. & Ann. St. 1903 (section 6123, Comp. Laws 1909), provides that it is sufficient if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be, but, if he deny the title of plaintiff, possession by him shall be taken as admitted. The rule demanding that plaintiff recover upon the strength of his own title necessarily requires him to come into court prepared to meet any objections urged thereto by the defendant, whether they be legal or equitable. But a claim of a right to the possession of land growing out of the improvements placed thereon has never, as far as we have been able to find, been held to be such a title as will authorize defendant to recover in the action of ejectment, and especially would this seem so where no plea has been made for the same. A number of the states have passed what are known as "Occupying Claimants" acts, which are generally administered in conjunction with the statutory action for the establishment of title and the recovery of possession of real property.

In Oklahoma the act is contained in article 25 of chapter 66, Wilson's Rev. & Ann. St. 1903 (article 24, c. 87, Comp. Laws 1909). This chapter provides substantially that in all cases, any occupying claimant being in quiet possession of any lands or tenements for which he can show color of title, in the manner set forth therein, he shall not be evicted or thrown out of

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possession by any person or persons who shall set up and prove an adverse and better title to said lands until he has been paid the full value of all lasting and valuable improvements made thereon, and that the court rendering judgment in any case against an occupying claimant shall at his request, for the benefit of the provisions of the act, cause an entry to be made upon the journal and set a day for the trial, and that, if on the trial there provided for the value of the same is found to be greater than the value of the rents and damages and waste, then the court shall enter judgment that the successful claimant pay to the clerk of the court for the use of the occupying claimant the full amount of the excess value of the improvements, and that the same shall be paid before the writ of ouster shall issue. The remedy provided for in this statute is full and complete, and is entirely applicable to this case. The defendants holding as occupying claimants were not entitled to introduce their evidence or have their rights adjudicated on the trial of this action.

A similar statute obtains in the state of Missouri. Sections 2259-2260, R. S. 1879. That court has in a number of cases held that a claim for improvements made by an occupying claimant is intended to be an independent proceeding, and can be instituted only after final judgment for possession shall have been rendered against the defendant in the suit for ejectment. *Henderson et al. v. Langley*, 76 Mo. 226; *McClannahan v. Smith*, 76 Mo. 428; *Jasper County v. Wadlow et al.*, 82 Mo. 172; *Jasper County v. Mickey* (Mo.) 4 S. W. 424.

It therefore follows that the judgment of the trial court in so far as the same adjudicates the right to and the amount allowed for the improvements placed upon the land in question must be reversed, and affirmed as to that portion in which judgment is found for plaintiff alone. That a party claimant may secure the benefit of this occupying claimants act after appeal of the original action to the Supreme Court and on the return of the mandate, see *State ex rel. Goldsborough v. Huston*, 28 Okla. 718, 116 Pac. 161; *Hazen v. Rounsaville*, 35 Kan. 405, 11 Pac. 150.

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The costs of this appeal will be equally divided between the parties. Section 6088, Comp. Laws 1909.

The cause is accordingly remanded to the trial court, to the end that such action may be taken as the parties may elect, not inconsistent with this opinion.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; KANE, J., dissents.

BILBY v. THOMAS GIN-COMPRESS CO.

No. 1909. Opinion Filed June 25, 1912.

(124 Pac. 1093.)

1. **EVIDENCE—Opinion Evidence—Matters Directly in Issue.** Plaintiff sold defendant certain gin machinery, with a warranty that with proper management it was capable of doing good work, and in ginning rough and dirty cotton would make a cleaner sample than any other gin on the market running under the same conditions; that the materials used in its construction were guaranteed to be of the best stock obtainable and the workmanship A No. 1. On the failure of the defendant to pay for the same, plaintiff brought suit for the price thereof. Defendant pleaded the contract of sale, the warranty, and its breach. On the examination by plaintiff of its salesman, shown to have been a man possessing years of experience with such machinery, over the objection and exception of defendant, he was permitted to answer in the affirmative the following questions: "I will ask you to state whether or not the machinery that you sold Mr. Bilby was exactly as represented in the contract which he signed?" and, "Mr. Hutchinson, now, I will ask you that with proper management, now this warranty that Mr. Bilby signed at the time you sold him this machinery, that with proper management they are capable of doing good work, and in ginning rough and dirty cotton will make a cleaner sample than any other gin now on the market, running under the same conditions, will they do that?" and, "It says that the materials used in their construction are guaranteed to be of the best stock obtainable and the workmanship A No. 1, is that true?" **Held**, that the answers to the same, if accepted by the jury, amounted in effect to a determination of the specific issues then on trial, and the same were erroneous and prejudicial.

2. **SAME.** On a trial of an action wherein defendant pleads the breach of a warranty given by a vendor in his contract of sale of certain machinery, it is competent for defendant to show every fact which would support his claim that the machinery did

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not fulfill the warranty, but the same must be shown by facts, and not by the statement of mere conclusions.

3. **SALES—Breach of Warranty—Burden of Proof.** Where the only defense to an action to recover the purchase price of gin machinery delivered to the defendant and used by him is that it failed to conform to certain express warranties made by plaintiff, the burden is not on the vendor to show that it met the warranties, but is on the defendant to show that the same failed so to do.

(Syllabus by the Court.)

Error from District Court, Hughes County; John Caruthers, Judge.

Action by the Thomas Gin-Compress Company against N. V. Bilby. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Lewis C. Lawson, for plaintiff in error.

Crump, Skinner & Bailey, for defendant in error.

DUNN, J. This case presents error from the district court of Hughes county, in which on March 1, 1909, the defendant in error as plaintiff filed its petition in which it prayed for judgment against the defendant, plaintiff in error here, for the sum of $1,568.21 for and on account of certain goods, wares, and merchandise sold and delivered to him at his instance and request. To this petition defendant filed answer in which he admitted having purchased the goods from the plaintiff, but set up that the same was machinery for a gin, and was purchased on a contract containing a warranty. A copy of the contract was attached to the answer and introduced in evidence. The warranty contained therein read as follows:

"The Phelps Improved Cleaner Gins are sold subject to the following warranty: That with proper management they are capable of doing good work, and in ginning rough and dirty cotton will make a cleaner sample than any other gin now on the market running under the same conditions. Materials used in their construction are guaranteed to be of the best stock obtainable and the workmanship A No. 1."

Of this the defendant pleaded:

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"That the machinery was not as represented in said contract; that it would not perform the work for which it was intended; that it was not as represented; that this defendant requested the said plaintiff to make the said machinery good, but that plaintiff refused or neglected to do so; that this defendant when he was unable to make the said machinery perform its work properly and plaintiff failed to make said machinery good, and, after attempting to do so, failed to make the said machinery work properly, tendered the said machinery back to the said plaintiff, but plaintiff refused to accept the same, and that said plaintiff refused, and still refuses, to carry out its contract with this said defendant."

The reply was a general denial, on which issues the cause was presented to a jury, which returned a verdict in favor of plaintiff and against the defendant for the amount sued for with interest. Motion for new trial was filed and denied, and the cause has been regularly lodged in this court for review.

Counsel for defendant make a great many assignments of error, many of which in our judgment are without substantial merit and which on a new trial, which we find must be granted, would not likely occur again. Hence we do not notice them.

On the examination of witness Hutchinson, who it appears was the salesman who had sold this machinery to the defendant, and whose testimony was of undoubted consequence and weight because of his familiarity with the same, he was asked and permitted to answer in the affirmative, over the objection and exception of counsel for defendant, this question:

"I will ask you to state whether or not the machinery that you sold Mr. Bilby was exactly as represented in the contract which he signed?"

It is to be noticed that this was the specific, identical question which was presented to the court by the pleadings for the determination of the jury. It does not call for any fact, but calls for a conclusion made up of a large number of facts, and it is not couched in language which will permit the witness to give his testimony, but presents in the language of the attorney the ultimate fact at issue, and requires a simple assent. Thereafter, he was asked this question:

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"Mr. Hutchinson, now, I will ask you that with proper management now this warranty that Mr. Bilby signed at the time you sold him this machinery that with proper management they are capable of doing good work, and in ginning rough and dirty cotton will make a cleaner sample than any other gin now on the market, running under the same conditions, will they do that?"

To this question there was the objection that it was leading, and called for a conclusion of the witness. The same was overruled, and the witness again answered, "Yes." The witness was thereafter asked, referring to the warranty:

"It says that the materials used in their construction are guaranteed to be of the best stock obtainable and the workmanship A. No. 1, is that true?"

The objection made thereto was that it was leading and called for a conclusion. This likewise was by the court overruled, and the witness answered, "It is." The ruling on all of these questions was excepted to, and in this court is assigned as error. The purpose of interrogating witnesses concerning issues in a case is to give information to the jury, to the end that a conclusion may be reached in accordance with the facts. Witnesses and evidence are offered for the purpose of establishing facts, and it is for the jury, and not the witnesses or the counsel who interrogate them, to draw conclusions. Encompassed within the questions and answers asked and secured from this witness was the ultimate fact to be found by the jury of whether the machinery was exactly as represented in the contract, and whether with proper management it was capable of doing good work and making a cleaner sample than any other gin on the market, and whether it was constructed of the best stock obtainable and the workmanship thereon A. No. 1. If the jury accepted the testimony of this witness, and it had an absolute right to do so, notwithstanding any evidence which may have conflicted with it, there was no room for controversy as to who should recover in the case, for, by securing from the witness his assent to these bald, bare conclusions which covered the entire issue in the case, there was left no room for deliberation and consideration of the evidence of defendant wherein he sought to show that the machinery had failed to meet the demands of the warranty. To two of these

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questions complained of counsel for plaintiff offer no argument of extenuation in their brief, and in our judgment they are plainly erroneous, and prejudicially so.

In the case of *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275, the question at issue was whether there had been for two years last past sufficient water in the ditch to irrigate lands which had been previously irrigated by the ditch. A witness was asked this question:

"From your experience as a farmer, and in irrigation in connection with it, is there water enough in that ditch now, or has there been for the last two years, to irrigate the lands which have heretofore been irrigated by that ditch?"

Discussing the objection which was made to this question, the court says:

"This question was objected to, first, on the ground that it did not appear that the witness had knowledge; and second, because the matter embraced in the question was the question then at issue and on trial. The objection was overruled. The ruling was excepted to, and is assigned for error. Without noticing the first ground of objection, it is clear that the objection was well taken upon the second ground, and should have been sustained. The question was not merely introductory. It embraced the very substance of the issue which the court was then trying; and a categorical answer, such as the question called for, would, if accepted by the court, have been a complete determination of the issue. It is an elementary rule that such questions are inadmissible. We are aware that direct questions are not always to be regarded as objectionable; there are exceptions to the rule; but certainly the foregoing is not one of them. The answer in this case, though not very direct, was of such a sweeping, general, and argumentative character that it is impossible to say that its effect upon the mind of the court was harmless. Counsel should not have taken the risk of such a question. The objection having been interposed in apt time and terms should have been heeded, and the question withdrawn or modified. 2 Best on Evidence, sec. 641; 1 Wharton on Evidence, sec. 499, and notes; 2 Phillips on Evidence, sec. 889, and notes."

Other authorities supporting the same general rule as announced therein may be noted as follows: 8 Ency. Plead. & Prac. 78, 79, and cases under note 1; *Hall v. Goodson*, 32 Ala. 277; *Walker v. Walker's Executor*, 34 Ala. 469; *Conner v. Stanley*,

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Adm'r, 67 Cal. 315, 7 Pac. 723; *Crawford v. Birkins,* 16 Colo. App. 532, 66 Pac. 687; *Old et al. v. Keener et al.,* 22 Colo. 6, 43 Pac. 127; *Denver & Rio Grande R. Co. v. Vitello,* 34 Colo. 50, 81 Pac. 766; *St. Louis, J. & C. R. Co. v. Trustees, etc.,* 43 Ill. 303; *Campbell v. Russell,* 139 Mass. 278, 1 N. E. 345; *Wiggins v. St. Louis, M. & S. Ry. Co.,* 119 Mo. App. 492, 95 S. W. 311; *National Bank of Chelsea v. Isham,* 48 Vt. 590.

In addition to the assignments of error made to these questions, counsel for defendant assign as error the ruling out of considerable evidence tendered by him in support of his answer, all of which he claims tended to show that the gin machinery failed in meeting the warranty. Much of this evidence tendered by defendant was sought to be introduced on questions similar in character to those which we have just held were incompetent. They call for conclusions of the witnesses as to whether the gin machinery met the demands of the contract. The court very properly refused to admit such evidence, but there were questions which called for specific details of fact going to show that the work done by this gin was not as good as the work generally done, and not up to the standard of what it should have performed. All of such testimony should have been admitted. If the farmers raising cotton in that vicinity refused to patronize the gin, and if this was because of the inferior character of work done by it, their testimony was competent to show this fact. If the grade of cotton which this gin turned out was inferior, due to the character of work which it did in ginning it, and by reason of this inferiority the owners thereof were unable to secure as good a price therefor as they could get at the same time for the same cotton, ginned by other gins, this likewise is a competent fact to go to the jury to show that the warranty failed. If the gin left undue quantities of lint upon the cotton seed, thereby losing not only the lint cotton, but reducing the value of the seed for planting purposes, and this was due to the inferiority of the machinery and tending to establish a breach of the warranty, then this was a competent fact to go to the jury on the question at issue, but all of this testimony is predicated upon the proposition that the defendant, who was charged with the operation of

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this gin, conducted the same properly with skilled workmen so as to give it a fair opportunity to do the work for which it was intended. But all of this evidence should be drawn from the witnesses, not as it was attempted in some cases by asking for conclusions, but by showing the facts going to make up the ultimate conclusion.

Counsel for defendant also inveigh against the instructions which were given by the court to the jury, and in view of a new trial, notwithstanding the fact that the case is reversed upon another point, we have examined the instructions carefully, and in our judgment they correctly state the law on the issues as framed. Exception is taken because under them the burden was placed upon the defendant to establish the failure of the warranty; it being contended that, plaintiff having sold the machinery under a warranty, the burden was upon it to show compliance therewith. This would be the case if plaintiff had brought its action upon the contract, and pleaded the warranty and the fulfillment thereof. But the plaintiff pleaded merely upon the demand which it held against the defendant for and on account of the sale. The defendant did not deny the sale, but admitted it, and himself pleaded the warranty, and that the machinery was not up to the standard fixed thereby. Under these circumstances, the authorities without dissent place the burden upon the party pleading it. The question of where the burden of proof lies in any cause is answered when the party to whom the judgment would go if no evidence was offered is determined. In the case at bar plaintiff's plea was a demand for judgment for the price of certain machinery sold. The defendant answered admitting the purchase of the said machinery, but the same was purchased under a contract which contained a warranty. Without further averments, judgment would automatically go for plaintiff. but defendant then pleaded that the warranty was breached by the character of the machinery delivered, and the burden is necessarily upon him to show this fact. Authorities supporting this proposition may be noted as follows: *Acme Harvester Co. v. Erne*, 63 Kan. 858, 66 Pac. 1004; *Purity Ice Co. v. Hawley, etc., Furnace Co.*, 22 App. Cas. D. C. 573; *Stilwell, etc., Co. v. Biloxi Canning*

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Co., 78 Miss. 779, 29 South. 513; *Carter & Dorough v. Minton et al.*, 119 Ga. 474, 46 S. E. 658; *Keystone Mfg. Co. v. Forsyth*, 123 Mich. 626, 82 N. W. 521; *Erie City Iron Works v. Dempsey*, 77 Ill. App. 667; *Dean Co. v. Standifer*, 37 Tex. Civ. App. 181, 83 S. W. 230; *Schumann v. Wager*, 36 Ore. 65, 58 Pac. 770.

The rule stated in the case of *Dean Co. v. Standifer, supra*, is that, "where the only defense to a suit for the purchase price of an article is the breach of an express warranty, the burden of so proving such warranty and breach is on the defendant and the court should so charge." The instructions in the case at bar do no more than place this burden upon the defendant, and properly so.

For the reasons set forth in the foregoing opinion, the judgment of the trial court is reversed, and the cause is remanded, with instructions to set the same aside and grant defendant a new trial.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; HAYES, J., not sitting.

BUFFALO v. LETSON.

No. 1922. Opinion Filed June 25, 1912.

(124 Pac. 968.)

1. **DIVORCE—Alimony—Conveyance to Defeat.** Under sections 906 and 2774, Wilson's Rev. & Ann. St. 1903 (sections 1213 and 2932, Comp. Laws 1909), a conveyance of real estate made in bad faith or for the purpose of hindering, delaying, or defrauding any creditor or other person is void as against all persons to whom the maker is at the time indebted, or under any legal liability, and, where a husband against whom there is pending a suit for divorce transfers real estate to a party who takes the same with full knowledge of the rights of the wife and for the purpose and intent of taking from her any right of alimony therein, the transfer is void.

2. **SAME—Rights of Parties—Injunction.** Where an execution issued on the judgment of a divorced wife is levied upon real estate, the title to which was previously vested in the husband, and which was fraudulently transferred for the purpose of defeating her rights therein, and an injunction is brought to re-

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strain the sale thereof, the question of the good faith of the conveyance may be determined in the said injunction suit.

(Syllabus by the Court.)

Error from District Court, Washington County; John J. Shea, Judge.

Action by W. A. Letson against Olive A. Buffalo. Judgment for plaintiff. Defendant brings error. Reversed and remanded, with instructions.

Norman Barker, for plaintiff in error.

Fred B. Woodward and *B. A. Lewis,* for defendant in error.

DUNN, J. This case presents error from the district court of Washington county, and is an action brought by defendant in error to enjoin the sale of certain land on an execution issued on a judgment and decree for alimony, procured by plaintiff in error November 4, 1909, against Thomas Buffalo, her husband. Eliminating the portions not necessary to be considered herein, plaintiff's petition alleges that he is now and was at the time thereafter set forth, and since the 4th day of June, 1908, the owner in fee simple of a certain tract of land, being that upon which the execution was levied. He states that on the 4th day of June, 1908, he purchased the same from Thomas Buffalo, and that he paid therefor a good and sufficient consideration, and received a warranty deed; that on the 25th day of July, 1908, Olive A. Buffalo filed a petition in the district court of Washington county for a divorce from the said Thomas Buffalo, and on November 4, 1908, a decree and judgment was rendered giving to plaintiff $2,500 as alimony; that execution issued against the defendant for the whole of the said sum, and that the sheriff of Washington county made a levy upon the lands which had been previously transferred by the said defendant to the said W. A. Letson, and that the same were advertised to be sold by him on the 16th day of March, 1909, and that the sheriff was about to and would sell the above-described land unless restrained by order of the court. To the said petition defendant filed answer, in which she, among other things, averred that the plaintiff Letson, "for the

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purpose and intent of taking away from her and her said two small children her right of alimony therein, and with knowledge of and concerning the pendency of this action and in violation of the law, wrongfully and collusively and for the purpose of divesting this court of its jurisdiction thereof, and for an inadequate and insufficient consideration, bought or pretended to buy the said property herein above mentioned from the said Thomas Buffalo, all of which proceedings were wholly without the knowledge or consent of this defendant." It also appeared that her action for divorce was filed June 21, 1907, service in which was had July 10, 1907, and the same was pending when the deed was made. To the said answer the said plaintiff filed a general demurrer, which was by the court sustained and to which exception was duly saved. From a judgment making the temporary injunction issued permanent, the said Olive A. Buffalo has duly lodged the case in this court.

Two questions are presented for our consideration: First. Are the averments of the said answer which we have noted sufficient to entitle defendant to the relief which she demands? Second. May the issue presented be tried in this character of an action? To both of these in our judgment an answer in the affirmative is demanded.

Section 906, Wilson's Rev. & Ann. St. 1903 (section 1213, Comp. Laws 1909), provides:

"Every conveyance of real estate or any interest therein, and every mortgage or other instrument in any way affecting the same, made without a fair and valuable consideration, or made in bad faith, or for the purpose of hindering, delaying or defrauding creditors, shall be void as against all persons to whom the maker is at the time indebted or under any legal liability."

Section 2774, Wilson's Rev. & Ann. St. 1903 (section 2932, Comp. Laws 1909), provides:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

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In our judgment either of these sections of the statute is sufficiently broad under the averments of this answer to nullify the transfer made of this property. That a wife with a decree for alimony in her behalf is entitled to avail herself thereof was decided by the Supreme Court of the Territory of Oklahoma in the case of *Bennett v. Bennett,* 15 Okla. 286, 81 Pac. 632, 70 L. R. A. 864. In the discussion of that case the court said:

"In the case of *Small v. Small* [56 Kan. 1] 42 Pac. 323 [30 L. R. A. 243, 54 Am. St. Rep. 581], a decision rendered by the Supreme Court of Kansas and a decision which is cited with approval by our own Supreme Court in the case of *Farrell v. Puthoff,* 13 Okla. 164 [74 Pac. 96], the Supreme Court of Kansas says: 'There is no reason why a wife whose husband has deserted her, and refused to perform the duty of maintenance, or who, by cruel treatment, has compelled her to leave his house and commence proceedings for divorce and maintenance, should not be viewed as a quasi creditor in relation to the alimony which the law awards her. So long as she is receiving maintenance, and is under his wing, as it were, she is bound by his acts as to his personal estate; but, when she is compelled to become a suitor for her rights, her relation becomes adverse, and that of a creditor in fact, and she is not to be balked of her dues by his fraud.' Section 2774, Wilson's Rev. & Ann. St. 1903, provides: 'Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor.' Now if the wife, technically speaking, is not a creditor, she is included in the term 'other person,' in the statute regarding fraudulent conveyances; and when the husband, by cruel treatment, compels the wife to leave him, and bring action for divorce and alimony, she is a quasi creditor in relation to the alimony which the law awards her. *Tyler v. Tyler* (126 Ill. 525) 21 N. E. 616 (9 Am. St. Rep. 642); *Small v. Small* (56 Kan. 1) 42 Pac. 323 (30 L. R. A. 243, 54 Am. St. Rep. 581); *Farrell v. Puthoff,* 13 Okla. 159 (74 Pac. 96)."

While the question of *lis pendens* has been raised and discussed by counsel for the different parties herein, it is not essential that we predicate our conclusion upon the ground that the petition of plaintiff in the divorce action was sufficient to give to this plaintiff such notice. On this question see *Wilkison v. Elliott et al.,* 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158.

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The averments of the answer are that this grantee with full knowledge of the defendant's rights, and for the purpose and with the intent of taking away from her and her two small children her right of alimony therein, and with knowledge of and concerning the pendency of the action, collusively and for the purpose of divesting the court of its jurisdiction bought or pretended to buy the said property. The establishment of these facts will defeat this conveyance, without reference to whether the petition of plaintiff in the divorce action gave notice or not. In support of this proposition, see, also, 1 Moore on Fraudulent Conveyances, p. 202, and authorities cited under note 58; 2 Bigelow on Fraudulent Conveyances, pp. 170, 171.

As to the question of whether under the issues made by the petition and answer the right of the grantee to the land can be tried in this action, it is said in 2 Moore on Fraudulent Conveyances, at page 748, that:

"Where a creditor is allowed to seize property fraudulently conveyed and the sheriff or other officer has taken it under process duly issued, they have a right to show, in defense to an action for ejectment, replevin, trespass, trover, or other proceedings, brought by the grantee against the creditor, or against the officer making the levy, to compel the restoration of the property or recover damages for the seizure, that the title of the plaintiff, claiming under a conveyance or transfer from the grantor, is fraudulent as against the creditors of the grantor."

Also, this same general rule is stated in 20 Cyc. p. 656, as follows:

"The title, for the purpose of enabling creditors to enforce their debts against the property conveyed, still remains in the grantor, just as though the conveyance had not been made. A direct action to set aside the conveyance is not required."

See cases cited under note 88.

Under these circumstances, the judgment of the trial court is reversed, and the cause remanded, with instructions to require plaintiff to reply and take such proceedings in the cause not inconsistent with this opinion as may be just and proper.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; HAYES, J., absent, and not participating.

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JOINER *et al.* v. ARDMORE LOAN & TRUST CO.

No. 1940. Opinion Filed June 25, 1912.

(124 Pac. 1073.)

1. **CORPORATIONS—Actions—Pleading.** An answer setting up a plea in bar to an action on a promissory note, which alleges, in substance, that plaintiff was a corporation incorporated under the laws in force in the Indian Territory prior to statehood, and was doing business at the time of the admission of Oklahoma into the union, and so continued to do business to the time of the filing of the action, and that it had not complied with the Constitution and laws of the state of Oklahoma in reference to corporations doing business in the said state at the time the transaction in suit took place nor at the time of the filing of the action thereon, is not effective as a plea in bar to such action on transactions had by the said corporation, under the provisions of section 43, article 9, par. 260, Williams' Ann. Const. Okla., and a demurrer to such plea is properly sustained.

2. **COVENANTS—Construction—Title to Realty.** A covenant in a deed holding lands described therein to the grantee, his heirs, and assigns in fee simple forever, and an agreement that grantor is lawfully seised in fee of the premises, is an assurance to the purchaser that the vendor has the very estate in quality and quantity which it purports to convey. Such a covenant imports an indefeasible estate and exacts a perfect title, which is not limited by a special warranty, unless the language of the deed taken all together clearly shows that it was the intent of the parties to give a special and limited warranty of title, as, except in such cases, a special warranty in a deed does not have the effect of controlling a precedent general covenant.

3. **SAME—Breach—Warranty of Title.** Where a grantor under general covenants of title sells and conveys land to a grantee of which it has no title, breach of the covenant occurs when made and notes given for the purchase price are without consideration, and where defended against on this ground, are unenforceable. Nor is this rule affected by the fact that both parties knew of the lack of title.

4. **VENDOR AND PURCHASER—Remedies of Purchaser—Recovery of Money Paid.** Where on a trial of an action to recover unpaid purchase money for lands conveyed under deed of general warranty, the title to which has wholly failed, the obligors plead such failure of consideration and tender a reconveyance, they are entitled to recover in such action any portion of the consideration paid, under the doctrine that money may be recovered by the owner from another wherever in equity and good conscience the latter has no right to retain it.

(Syllabus by the Court.)

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Error from District Court, Carter County;
S. H. Russell, Judge.

Action by the Ardmore Loan & Trust Company against C. M. Joiner and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. D. Gibbs, for plaintiffs in error.

Potter & Potter, for defendant in error.

DUNN, J. This case presents error from the district court of Carter county. The defendant in error as plaintiff begun its action to recover from plaintiffs in error on certain promissory notes given as part of the purchase price for certain lands described in a deed dated May 20, 1908, upon which a lien was retained as security for the payment thereof. To this petition defendants in their amended answer admitted the execution of the notes sued on for the purposes and consideration set forth in plaintiff's petition, but they denied any indebtedness to plaintiff for the reason that the lands purchased as described in plaintiff's petition were what were known as the one-fourth of the surplus, supposed to be alienable after issuance of patent in one year from the date thereof, of the following named persons. Here follow the names of a number of parties of whom it is averred that they were citizens of the Choctaw and Chickasaw Nations of the full blood, and that at the time of the purchase of the land and the execution of the notes the defendants paid to the plaintiff the sum of $2,250, and that thereafter the Congress of the United States authorized the bringing of suits for the cancellation of all deeds or transfers of allotments or portions of allotments of members of the Choctaw and Chickasaw Nations made contrary to law; that, in pursuance thereof, suits were brought in the United States District Court for the Eastern District of Oklahoma to cancel the said deeds of the said allottees to plaintiff and from the plaintiff to the defendants, alleging that said conveyances were illegal and void. It was further averred that defendants purchased the said lands relying upon the covenants, representations, and agreement of the plaintiff that it was

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lawfully seised in fee of said lands, and that the same were free from all liens and incumbrances, and that it had a good right to convey the same, except as set forth in the conveyances thereof, when in truth and in fact the plaintiff was not seised in fee and had no title to convey, the title to said lands having wholly failed, to the damage of defendants in the sum of $2,250, the same being the amount heretofore paid to the plaintiff on the purchase price of said lands. Defendants further answered that the Ardmore Loan & Trust Company is a corporation incorporated under the laws in force in the Indian Territory prior to statehood, and was doing business at the time of the admission of Oklahoma into the union, at Ardmore, Okla., and so continued to do business down to the time of filing this action; that as such corporation it had not complied with the Constitution and laws of the state of Oklahoma in reference to corporations doing business in said state at the time the transaction took place, nor at the time of the filing of suit thereon, and is not entitled to maintain such action. For prayer defendants prayed that plaintiff take nothing by its action, and that they recover of and from it the sum of $2,250, with interest thereon at the rate of 6 per cent. from January 6, 1909, and for cancellation of the notes sued on. The defendants at the same time tendered a reconveyance of the lands to the plaintiff. To this answer plaintiff filed a general demurrer, which was by the court sustained and judgment rendered, from which action defendants have prosecuted an appeal to this court on petition in error with transcript of the record.

Considering first the question of the right of plaintiff to maintain its action, defendants call attention to section 43 of article 9, par. 260, Williams' Ann. Const. Okla., which provides:

"No corporation, foreign or domestic, shall be permitted to do business in this state without first filing in the office of the Corporation Commission a list of its stockholders, officers, and directors, with the residence and post office address of, and the amount of stock held by each."

The question here raised was presented to this court in the case of *Cooper v. Ft. Smith & W. R. Co.*, 23 Okla. 139, 99 Pac. 785, and on it, it was said:

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"An answer setting up a plea in bar to a suit on a promissory note given in aid of the construction of plaintiff's line of railroad which alleges, in substance, that at the time it was executed plaintiff was and still is a foreign corporation, and as such has failed to comply with Wilson's Rev. & Ann. St. 1903, secs. 1225 and 1227, is bad, as it was not the intent of the Legislature, by inhibiting such corporation from doing business in the state, to deprive it of the right to sue in its courts or to render void contracts made by it in the state, and a demurrer thereto was properly sustained."

Therefore that plaintiff had a right to maintain its suit was properly sustained by the judgment of the trial court.

The other questions raised by the defendants' answer presented in the brief of counsel are not so free from difficulty. The defendants pleaded that they purchased the lands, relying on the covenants, representations, and agreements of plaintiff that it was lawfully seised in fee of the lands, and that it had a good right to convey the same. The particular section of the deed in which these covenants are contained reads as follows:

"To have and to hold the above-described premises unto the said C. M. Joiner, his heirs and assigns in fee simple forever. And the said Ardmore Loan & Trust Company does for itself, its successors and assigns, covenant and agree with the said C. M. Joiner, his heirs and assigns, that it is lawfully seised in fee of the afore granted premises, that the same is free and clear of all liens and incumbrances, except deferred payments, which is assumed by the grantees, that it has a good right to sell and convey the same unto the said C. M. Joiner, his heirs and assigns, and that it will forever warrant and defend the same unto the said C. M. Joiner, his heirs, executors, administrators and assigns against the lawful claims of any and all persons whomsoever, lawfully claiming or to claim the same or any part thereof, by, through or under it, a vendor's lien is hereby retained on said property to secure the deferred payments as set out above."

The foregoing covenant and agreement that plaintiff was lawfully seised in fee of the premises, and that the same were free and clear of all liens and incumbrances, and that it had a good right to sell and convey the same, except as to the deferred payments mentioned, is a covenant for title. Maupin on Marketable Title to Real Estate (2d Ed.) sec, 108. Therein is stated the rule

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generally prevailing in the United States "that a covenant that the grantor is 'lawfully seised' is the same as if he had covenanted that he was rightfully seised of an indefeasible estate in fee simple, and is to be treated as 'an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey.'" See, also, Devlin on Deeds (3d Ed.) sec. 885, and the authorities therein noted. The rule which generally prevails in the United States under such a covenant is stated by the Supreme Court of Tennessee in the case of *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119, as follows:

"A covenant of seisin in a deed for land is an assurance to the purchaser that the vendor has the very estate in quality and quantity which he purports to convey. It imports a seisin in law, and exacts a perfect title; and is not fulfilled by a transfer to the purchaser of an actual seisin."

Section 19, Act Cong. April 26, 1906, c. 1876, 34 St. at L. part. 1, pp. 137, 144, provided in part as follows:

"That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress. * * *"

The restrictions had not at the time of these conveyances been removed, and hence it must follow, under this act, that the deed was void and plaintiff had no title which it could convey, and none which could inure to the benefit of its grantee. This fact was not only known to the plaintiff at the time, but was equally known to the defendants, and the question arises whether the defendants with this knowledge could avail themselves of the failure of title in the plaintiff, and plead that their contract was without consideration because of this fact. An investigation of the authorities convinces us that they could. The rule seems to be that:

"The right of recovery for a breach of a covenant of seisin is not affected by the fact that it was known to one or both of the parties at the time the covenant was made that the grantor had no title to the land or any part of it. Bailey, P. J., in the

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case cited (*Wadhams v. Innes,* 4 Ill. App. 642, 646), quoted with approval the language of the Supreme Court of that state in a former case (*Beach v. Miller,* 51 Ill. 211, 2 Am. Rep. 290): 'Where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound when both buyer and seller know that it is unsound; so the seller may warrant the quantity or quality of an article he sells when both parties know that it is not of the quality or does not contain the quantity warranted. In fact, the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality.'" (Devlin on Real Estate [3d Ed.] sec. 897.)

See, also, Rawle on Covenants for Title (5th Ed.) sec. 88; Maupin on Marketable Title to Real Estate, p. 335; *Batterton et al. v. Smith,* 3 Kan. App. 419, 43 Pac. 275; *Bolinger et al. v. Brake,* 4 Kan. App. 180, 45 Pac. 950; *Yancey v. Tatlock et al.,* 93 Iowa, 386, 61 N. W. 997; *Evans v. Taylor,* 177 Pa. 286, 35 Atl. 635, 69 L. R. A. 790.

But it is insisted on the part of counsel for plaintiff that its general covenant of title to the defendants was limited in its scope by that portion of the deed which read that it would warrant and defend the same unto the said grantee "against the lawful claims of any and all persons whomsoever, lawfully claiming or to claim the same or any part thereof, by, through or under it," and that, under this special warranty, its grantee was entitled to recover as against it only by showing that the failure of title of which he complained was due to some act, deed, or conveyance of which it was responsible. The effect of a special warranty contained in a deed following general covenants of title has been a source of much vexation to the courts. The rule for the construction of all contracts when there are conflicting provisions therein, so as to render the terms thereof ambiguous, is to ascertain as far as possible, from the language of the contract, the in-

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tent of the parties. Paragraph 788, Wilson's Rev. & Ann. St. 1903, provides for the purpose of ascertaining the intention of parties to a contract that the rules given in this chapter (chapter 15, Wilson's Rev. & Ann. Statutes) are to be applied. Paragraph 790, *Id.*, provides:

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this title."

Paragraph 792, *Id.*, provides:

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others."

Paragraph 794, *Id.*, provides:

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."

Paragraph 800, *Id.*, provides:

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Paragraph 801, *Id.*, provides:

"Particular clauses of a contract are subordinate to its general intent."

Paragraph 803, *Id.*, provides:

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause, subordinate to the general intent and purposes of the whole contract."

Paragraph 804, *Id.*, provides:

"Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected."

Paragraph 805, *Id.*, provides:

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body as such, and a private party, in which it

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is presumed that all uncertainty was caused by the private party."

From the foregoing provisions of the statute it is to be observed that the purpose of all interpretations is to secure and arrive at the actual agreement into which the parties entered, to ascertain the real intent in their minds at the time they dealt, and that this intent, when it is ascertained, shall be by the court given effect, but that, when ambiguity or uncertainty exists in the terms of any promise, the intention is to be interpreted in the sense in which the promisor believed that the promisee understood it, and that any uncertainty not removed by these considerations must be interpreted most strongly against the party who caused the uncertainty to exist, and that the promisor, except in cases of public officials, is presumed to be such party. In other words, therefore, in the construction of the contract here before us, the grantor is presumed to be the party who caused the uncertainty to exist. The foregoing statutes relate generally to the interpretation of contracts, but the rule therein laid down, conceding that uncertainty or repugnancy exists in this deed, requires us to construe the terms of this instrument against the promisor rather than in its favor.

This rule is by the courts generally applied to conflicting or inconsistent covenants in deeds, and to this end it is generally held as stated in the syllabus of the leading case of *Bender v. Fromberger*, 4 Dall. 436, 1 L. Ed. 898, that "a special warranty in a deed has not the effect of controlling a precedent general covenant." In this case it appears that the defendant and his wife had sold and conveyed a tract of land, and in their deed had "covenanted that the defendant was lawfully seised of a good, sure and indefeasible estate of inheritance, in fee simple, in the said land, and had good right, full power, and authority, in his own right, to grant and convey the same to the plaintiff in fee. The deed also contained a special warranty against the grantor and his heirs, and all persons claiming under them." On an action in which it was assigned as a breach that the defendant was not seised nor had he a good right to convey the land in fee to the plaintiff, the court in considering the contentions of the defendant said:

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"The defendant contends that his intention was to give no more than a special warranty, because the clause of special warranty is inconsistent with, and contradictory to, a general warranty. Now, in this, I cannot agree with him. It is certain that the special warranty, and more, is included in the general one. It is an inaccurate mode of conveyancing; but there is no absurdity or contradiction in making one covenant against yourself and your heirs, and another against all mankind. The special warranty was unnecessary, and is to be attributed to the ignorance of the scrivener, who, probably, thought it was a matter of course, without intending, to affect the more general preceding covenant, or, perhaps, he might think it necessary to guard against the effect of the words 'grant, bargain, and sell,' used in the first part of the deed, because the estate was subject to a ground rent, as appears from the general covenant, in which it is said that the estate is free from all incumbrances except the said ground rent. It has been urged that it is all one covenant, because the special warranty is connected with the preceding general covenant by the words 'and that.' It is very common to connect a covenant of warranty and a covenant for further assurance by these expressions. But what I rely on is the intent of the parties, manifested in the deed considered altogether. I do not conceive it is possible for a man of common sense to declare that he engages that he had a perfect estate in fee simple and had a good right to convey such perfect estate, without intending to warrant to a greater extent than against himself and his heir. These are no technical expressions, but such as every man understands, which is not the case with a special warranty. To a common man it is not very intelligible that there should ever be occasion to warrant and defend against himself, and all persons claiming under him; for it is very natural to suppose that, when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself and all persons claiming under him without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty is generally the act of scriveners; but I presume that no scrivener could be so stupid as to insert a covenant that 'the grantor was seised of an indefeasible estate in fee,' unless he had been told by the parties that a general warranty was intended. I am therefore of opinion that the special warranty in this deed has not the effect of controlling the precedent general covenant, and that judgment should be entered for the plaintiff."

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The foregoing discussion in our judgment is entirely applicable to the deed which is here before us. The general covenant of title and of the right to convey embraced all that the special warranty contained and more. The special warranty herein was without effect to operate upon the title which the grantor had conveyed. To give to this special warranty the force contended for by counsel for grantor would be to allow plaintiff to take from defendants, not only the money which it had already received, but to recover the amount sued for herein, and that, too, without any consideration whatsoever. Such a construction would require on the part of the court the rendition of a judgment in plaintiff's favor, and exact from the defendants the money prayed for upon the mere empty covenant contained in the deed. The defendants were not contracting for a promise. They were dealing with plaintiff in order to secure title to land, and, when it develops that plaintiff is wholly without title and that defendants secure absolutely nothing, no court, prompted by considerations of justice, will enforce such a demand. A somewhat similar case is that of *Rice v. Goddard,* 14 Pick. (Mass.) 293, the syllabus therein reads as follows:

"In an action on a promissory note given for the purchase money of land conveyed by deed with covenants of seisin and warranty, the action being between the original parties, it is competent for the defendant to prove by way of defense a total failure of title to the land."

In the discussion of this case the Supreme Judicial Court of Massachusetts said:

"The note was given in consideration of the conveyance of land by deed with the usual covenants of seisin and warranty. The title to the land failed entirely; and the question is whether that want of title is an entire want of consideration for the note, so as to render it *nudum pactum,* or whether the covenants were of themselves a sufficient consideration to support the promise. It was decided by the court in Maine in *Lloyd v. Jewell,* 1 Greenl. 360, that the covenants were a sufficient consideration. The decisions of that court are entitled to great respect. The opinion, however, in the case cited was grounded on what was considered to be the settled law of Massachusetts; but, though there have been *dictums* (*Fowler v. Shearer,* 7 Mass. 19; *Phelps v. Decker,*

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10 Mass. 279), there has been no decision in this state to that effect, and so the foundation of the opinion fails. The same subject has been before the courts of other states, and the decisions have uniformly been that a total failure of title is a total failure of the consideration. *Frisbee v. Hoffnagle,* 11 Johns. [N. Y.] 50; *McAllister v. Reab,* 4 Wend. [N. Y.] 483; *Steinhauer v. Witman,* 1 Serg. & R. [Pa.] 447; *Gray v. Handkinson,* 1 Bay [S. C.] 278; *Bell v. Huggins,* 1 Bay [S. C.] 327; *Chandler v. Marsh,* 3 Vt. 162; *Tillotson v. Grapes,* 4 N. H. 448. The promise is not made for a promise, but for the land, the moving cause is the estate, and, if that fails to pass, the promise is a mere *nudum pactum.*"

Defendants tendered a reconveyance and demanded judgment for the amount which they had paid, and the same considerations which demand at our hands a denial of the right of plaintiff to a judgment, it seems to us, should grant to the defendants the right to recover. On the question of possession on failure of title, and the breach of the covenant, see *Faller v. Davis et ux.,* 30 Okla. 56, 118 Pac. 382; *Fitzhugh v. Croghan,* 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139. Plaintiff has accepted from defendants a sum of money for which it gave nothing. It went through the form of conveying a title to certain lands which it did not own, and to which it could give no right. It admits having received from defendants the sum of money pleaded in the answer, which in our judgment it has no right to retain, for the simple reason that it has never given anything for it. In such a case an action will lie to recover, for whenever one has the money of another which he in equity and good conscience has no right to retain, it may be recovered. *Allsman et al. v. Oklahoma City,* 21 Okla. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, 17 Ann. Cas. 184.

The judgment of the trial court on the demurrer is accordingly reversed, and the cause is remanded to take such further proceedings not inconsistent with this opinion as the facts developed on a trial may show to be just and equitable.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; HAYES, J., absent, and not participating.

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WOODARD *et al.* v. STROSNIDER, *Co. Superintendent, et al.*

No. 1313. Opinion Filed June 25, 1912.

(124 Pac. 967.)

SCHOOLS AND SCHOOL DISTRICTS—Formation of School Districts—Appeal. Article 6, c. 45, p. 245, Sess. Laws 1895, being section 8080, Comp. Laws 1909, was not superseded or repealed by section 1 of article 5, c. 34, p. 271, Sess. Laws 1910, and appeal by persons aggrieved by the formation or alteration of school districts lying partly in two or more counties lies to the State Superintendent of Public Instruction and not to the board of county commissioners of either of the counties in which any portion of the said districts may be located.

(Syllabus by the Court.)

Error from District Court, Pawnee County;
L. M. Poe, Judge.

Action by S. M. Woodard and others against John Strosnider, County Superintendent, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Eagleton, Biddison & Merritt, for plaintiffs in error.

E. M. Clark, for defendants in error.

DUNN, J. This case presents error from the district court of Pawnee county. The controversy grows out of action on the part of the county superintendents of public instruction of Pawnee and Tulsa counties, wherein they acted jointly in the formation of a school district out of contiguous territory lying in the two counties, action being taken under section 8080, Comp. Laws 1909, which reads as follows:

"When it shall become necessary to form a school district lying partly in two or more counties the county superintendents of the counties in which the said tract of country shall be situated when application shall be made in writing to any one of them by five household residents therein, shall, if by them deemed necessary, meet and proceed to lay off and form the same into a school district, issue notices for the first district meeting, and shall file the proper papers in their respective offices and such dis-

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trict so organized shall be designated joint district No. ———, counties of ———, and the boundaries of such district shall not be altered except by the joint action of the superintendents of the several counties represented in said district: Provided, that if in the alteration of or refusal to alter the boundaries of any joint school district, any person or persons shall feel aggrieved, such person or persons may appeal to the State Superintendent of Public Instruction, and notice of such appeal shall be served on the superintendents of the several counties represented in said district within ten days after the rendition by them of the decision appealed from, which notice shall be in writing and shall state fully the objections to the actions of the county superintendents, and a copy thereof shall be filed with the State Superintendent of Public Instruction; and it shall be the duty of the county superintendents in whose possession are the papers connected with the action appealed from, to transmit the same to the State Superintendent of Public Instruction immediately upon being served with notice of appeal as hereinbefore provided, and thereupon the State Superintendent of Public Instruction shall fix a time for the hearing of said appeal and notify the several county superintendents interested, and they shall take action in accordance therewith. And provided further, that each joint district, except in matters relating to the alteration of the boundaries thereof shall be under the jurisdiction and control of the superintendent of that county represented in such district having the largest amount of territory embraced within the boundaries of such joint district."

From the action of the said superintendents, certain interested persons, feeling themselves aggrieved, attempted to appeal to the board of county commissioners of Pawnee county, which acting upon the matter sustained the action of the county superintendents, and assumed to complete the organization of the new joint school district. From this action the plaintiffs instituted an injunction proceeding in the district court. The prayer to the petition filed herein is that the order made by the board of county commissioners be reversed and vacated, and that the said board and the county superintendent be enjoined pending a hearing of the cause from any further proceeding toward carrying out the decision rendered by the board of commissioners, and that they be perpetually enjoined from proceeding to alter the boundaries of the school district involved. To this petition a

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demurrer was filed, including a demand that the proceeding abate at the cost of plaintiff. On a hearing duly had the judge of the district court adjudged that the board of county commissioners of Pawnee county was without jurisdiction to hear the appeal from the county superintendent, and that the petition did not state a cause of action in favor of plaintiffs and against defendants, dismissed the petition, and rendered judgment in favor of defendants and for their costs. From this action appeal has been prosecuted to this court on a transcript of the record.

Reliance for success of the appeal prosecuted in this court is based on the contention that section 1 of article 6, c. 45, p. 245, Sess. Laws 1895 (section 8080, Comp. Laws 1909), was superseded or repealed by section 1 of art. 5, c. 34, p. 271, Sess. Laws 1897 (sec. 7975, Comp. Laws 1909), and its successor (chapter 107, p. 202, Sess. Laws 1910), and that appeal from the action of county superintendents in the formation of joint school districts lies to the board of county commissioners of the county wherein the school district is situated, and not to the State Superintendent of Public Instruction, as provided by section 8080, *supra*. In our judgment this contention cannot be sustained, for the reason that the acts are not inconsistent with each other, but were manifestly passed for different purposes. The original act, section 8080, *supra*, is entitled, "An act to provide for the formation of school districts situated in two or more counties"; while the acts which it is contended superseded or repealed it provide for the duties of a county superintendent in dividing his county into a convenient number of school districts and in changing the same when the interests of the people require it. The purposes of the two acts were entirely different and the procedure provided for by the Legislature for review of the action of the county superintendents, who had jurisdiction, was exclusive. Section 2 of article 1, c. 33, p. 359, Sess. Laws 1905, which provides for the consolidation of school districts, provides that "in the formation of consolidated districts comprising territory lying in more than one county, the county superintendents of said counties shall act together in the same manner as provided by law in the formation and control of joint districts." This court had occasion in the

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case of *Felkner v. Winningham et al., ante,* 122 Pac. 534, to pass upon this question, and said:

"From the action of the county superintendents acting jointly, section 8080, Comp. Laws of Oklahoma 1909, provides that an appeal may be had to the State Superintendent of Public Instruction, and that notice of said appeal shall be served on the county superintendents of the several counties represented in said district within ten days after the rendition by them of the decision appealed from, which notice shall be in writing, and shall state fully the objections to the actions of the county superintendents, etc. It follows that an appeal from the action declaring these three districts, one of which lies in Washita county, and the other two in Beckham county, consolidated, did not lie to the board of county commissioners, and that said board had no jurisdiction to entertain said appeal."

From the foregoing it follows that the judgment of the trial court must be affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

FT. SMITH & W. R. CO. v. WILSON.

No. 3114. Opinion Filed June 25, 1912.

(124 Pac. 948.)

APPEAL AND ERROR—Necessary Parties—Dismissal. Where, in an action for damages against two railway companies, judgment is entered against one and in favor of the other, and the former attempts to appeal, its codefendant is a necessary party, and where it is not made a party on appeal the cause will on motion be dismissed.

(Syllabus by the Court.)

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by S. M. Wilson against the St. Louis & San Francisco Railroad Company and the Ft. Smith & Western Railroad Company. Judgment for plaintiff against the Ft. Smith & Western Railroad Company, and in favor of the other defendant, and

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the Ft. Smith & Western Railroad Company brings error. Dismissed.

C. E. Warner and *H. P. Warner,* for plaintiff in error.

Burford & Burford, for defendant in error.

DUNN, J. This case presents error from the district court of Okfuskee county. The cause was instituted in the said court by S. M. Wilson against the St. Louis & San Francisco Railroad Company and the Ft. Smith & Western Railroad Company, alleging damages for injury to certain live stock shipped over the St. Louis & San Francisco Railway, and the Ft. Smith & Western Railway as a connecting carrier, from Kansas City, Mo., to Boley, Okfuskee county, Okla. The judgment of the court reads:

"It is ordered, adjudged, and decreed that the plaintiff have and recover of the defendant the Ft. Smith & Western Railroad Company the sum of $500, and his costs of this action duly expended, and that the defendant St. Louis & San Francisco Railroad Company have and recover of the plaintiff its costs in this action duly expended, and let execution issue accordingly."

From this judgment the Ft. Smith & Western Railroad Company has sought to lodge an appeal in this court without making its codefendant a party either plaintiff or defendant in error. The case-made was served upon counsel for defendant in error alone. May 3, 1912, counsel for defendant in error filed motion to dismiss the cause, for the reason that the St. Louis & San Francisco Railroad Company was a necessary party to the appeal.

It is impossible to distinguish this case from the case of *Humphrey et al. v. Hunt,* 9 Okla. 196, 59 Pac. 971, and the cases following it. In that case the court in the syllabus said:

"Where one B. and others were sued jointly for damages, and upon the trial judgment was rendered in favor of the defendant B. and against the plaintiff, but in favor of plaintiff and against all of the other defendants, and all of the defendants against whom judgment was rendered prepared a case-made and served it upon the plaintiff, and perfected their appeal to this court, but failed to serve the case-made upon the defendant B., and the plaintiff filed a motion to dismiss the appeal for the reason that all of the necessary parties are not made parties to the appeal, *held,* that B. is a necessary party, and should have been

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served with the case-made and with the summons in error. B. was a party to a joint judgment, and is, therefore, a necessary party to the appeal. One whose rights may be affected by a reversal or modification of a judgment appealed from is a necessary party in the appellate court."

In the consideration of the case the court said:

"It is clear that Belt (the omitted party) might be affected by a reversal of the judgment by which he was discharged from all liability to the plaintiff, and, if it should be vacated and set aside, and a new trial granted, he would have to defend in another trial and take the chances of a verdict being rendered against him. If he had been made a party, he could urge any reason he may have why the judgment should stand; but, from this record, the law presumes that he has no knowledge of the pendency of this appeal, and he cannot, therefore, be expected to enter an appearance. * * * It might be argued that, inasmuch as Mrs. Hunt failed to appeal from the judgment in favor of Belt, it became final as to him. This, however, cannot be true. The plaintiff submitted the entire matter to the jury, and, while she failed to recover a judgment against all of the parties whom she sued, she was satisfied with it, because she failed to appeal. But the judgment was a joint judgment, and all of the parties affected thereby must be made parties and given an opportunity to be heard, or the judgment will not be disturbed."

In the case at bar the plaintiff asserted a joint cause of action against both railway companies as connecting carriers. The jury found that the damage was due to the negligence of the Ft. Smith & Western Railroad Company, and not that of the St. Louis & San Francisco Railroad Company; and it is argued by counsel for defendant in error that, if the judgment should be reversed, it might be that upon a second trial the jury would believe that the negligence which caused the damages was imputable to the St. Louis & San Francisco Railroad Company, and not to the Ft. Smith & Western Railroad Company, and in that event the plaintiff would be confronted by a final judgment in favor of the St. Louis & San Francisco Railroad Company, and therefore be unable to pursue it. It is urged that, if the cause is reversed, plaintiff should have the right to proceed as he did in the first instance against both carriers, and again let the jury determine whose negligence caused the injury. Under the uniform holding

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of this court, following the reasoning in the case of *Humphrey et al. v. Hunt, supra*, the motion to dismiss must be sustained. See *Am. Nat. Bank of McAlester et al. v. Mergenthaler Linotype Co.*, 31 Okla. 533, 122 Pac. 507, and *K. C., M. & O. Ry. Co. v. Williams, ante*, 124 Pac. 63, and cases cited therein.

HAYES and KANE, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent, and not participating.

THOMPSON *et al.* v. REARICK.

No. 3336. Opinion Filed June 11, 1912.

(124 Pac. 951.)

HIGHWAYS—Taxation—Constitutional and Statutory Provisions. An act entitled "An act to provide for the voluntary formation of road districts, for the improvement of public highways therein, and authorizing the issuance of bonds; repealing all laws conflicting with the provisions of this act, and declaring an emergency" (chapter 124, pp. 271, 280, Sess. Laws 1910-11), **held** to be repugnant to section 9, art. 10, of the Constitution.

(a) On account of the limitations of said section 9, art. 10, of the Constitution, such road district as is provided for in said act may not levy and collect an **ad valorem** tax to pay interest on, or create a sinking fund for the payment of, road bonds to be issued by such district.

(Syllabus by the Court.)

Error from District Court, Caddo County;
J. T. Johnson, Judge.

Action between Clyde Thompson and others and R. P. Rearick. From the judgment, Thompson and others bring error. Affirmed.

I. H. Kerr, C. H. Carswell, C. B. Case, and *McKnight & Heskett,* for plaintiffs in error.

A. J. Morris, for defendant in error.

WILLIAMS, J. The following questions are raised in this case: That a certain act entitled "An act to provide for the vol-

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untary formation of road districts, for the improvement of public highways therein, and authorizing the issuance of bonds; repealing all laws conflicting with the provisions of this act, and declaring an emergency," approved March 22, 1911 (chapter 124, pp. 271, 280, Sess. Laws 1910-1911), is repugnant to the Constitution of this state as follows: (1) That it violates section 9, art. 10, in providing for an *ad valorem* tax by a subdivision therein prohibited. (2) That it violates section 7, art. 10, in that it seeks to impose burdens upon lands that may not be benefited by the road improvements. (3) That it violates section 24, art. 2, in that it damages or takes private property without just compensation. (4) That it violates section 1, art. 16, of the Constitution in delegating powers to certain local officers to fix the boundaries of road improvement districts, which are expressly lodged by said section in the Legislature. (5) That it violates section 7, art. 2, of the Constitution, in that no due process of law is afforded to the parties to be affected by such road improvement districts. It is essential only, in order to dispose of this proceeding, to pass on the first question.

Section 9 of article 10 provides:

"Except as herein otherwise provided, the total taxes, on an *ad valorem* basis, for all purposes, state, county, township, city or town, and school district taxes, shall not exceed in any one year thirty-one and one-half mills on the dollar, to be divided as follows: State levy, not more than three and one-half mills; county levy, not more than eight mills: Provided, that any county may levy not exceeding two mills additional for county high school and aid to the common schools of the county, not over one mill of which shall be for such high school, and the aid to such common schools shall be apportioned as provided by law; township levy, not more than five mills; city or town levy, not more than ten mills; school district levy, not more than five mills on the dollar for school district purposes, for support of common school: Provided, that the aforesaid annual rate for school purposes may be increased by any school district by an amount not to exceed ten mills on the dollar valuation, on condition that a majority of the voters thereof voting at an election, vote for said increase."

It will be observed that it is therein provided, with two exceptions, that *the total taxes, on an ad valorem basis, for all*

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purposes, to wit, state, county, township, city or town, or school district taxes, shall not exceed in any one year thirty- one and one-half mills on the dollar. The exceptions relate to county levies for schools not to exceed two mills, and an additional ten mills to be levied by school districts, when voted for by the electors of such district.

Section 9 is a limitation and not a grant of power; the limitation applying not only to the Legislature, but also to the counties, townships, cities or towns, and school districts. *Brooks v. Schultz,* 178 Mo. 222, 77 S. W. 861.

Section 2, art. 17, of the Constitution, is as follows:

"There are hereby created, subject to change by the Legislature, in and for each organized county of this state, the offices of judge of the county court, county attorney, clerk of the district court, county clerk, sheriff, county treasurer, register of deeds, county surveyor, superintendent of public instruction, three county commissioners, and such municipal township officers as are now provided for under the laws of the territory of Oklahoma, except as in this Constitution otherwise provided."

Section 26, art. 10, of the Constitution, is as follows:

"No county, city, town, township, school district, or other political corporation, or subdivision of the state, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum of the valuation of the taxable property therein, to be ascertained from the last assessment for state and county purposes previous to the incurring of such indebtedness: Provided, that any county, city, town, township, school district, or other political corporation, or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same."

The act here under consideration contemplates the creation of a political corporation or subdivision of the state other than

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counties, cities, towns, townships, or school districts, and which is not the successor of any of said subdivisions. That being so, it is not permissible to levy any tax on an *ad valorem* basis for such subdivision. The township officers, or the name of the political subdivision denominated as a township, may be changed by the Legislature, but such subdivision, as changed, would become the successor to such township or political subdivision. This was contemplated by the use of the term, "or other political corporation, or subdivision of the state." Such would also be the case as to a county, city or town, township, or school district political subdivision, which may be changed by the Legislature and divided into classes, and the limitations in section 9 would also apply to such subdivisions taking the place of the political subdivisions enumerated in said section 9, being a subdivision of the same kind—*ejusdem generis*. *Maben v. Rosser et al.*, 24 Okla. 588, 103 Pac. 674. If this were not true, said section 9 would not in fact operate as a limitation on taxation on an *ad valorem* basis, for the Legislature, by creating road districts, health districts, and other subdivisions in the exercise of police power, could avoid the limitations on an *ad valorem* basis imposed by said section 9.

We take it that said section 9 means just exactly what it says; that, except as herein otherwise provided, the total taxes, on an *ad valorem* basis for all purposes, shall not exceed in any one year thirty-one and one-half mills on the dollar, with the two exceptions therein enumerated. It may be urged that this does not give effect to the phrase, "except as herein otherwise provided."

Section 10 of article 10 provides:

"For the purpose of erecting public buildings in counties, cities, or school districts, the rates of taxation herein limited, may be increased, when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and a majority of the qualified voters of such county, city, or school district, voting at such election, shall vote therefor: Provided, that such increase shall not exceed five mills on the dollar of the assessed value of the taxable property in such county, city, or school district."

Section 36, art. 5, which provides:

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"The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever"

—has no application whatever to section 9, art. 10, as that section is a limitation and not a grant of power; but said section 36 does apply to section 1, art. 16, as that is a grant of power, and for that reason we hold that counties and townships may issue bonds within the limitations prescribed by section 26, art. 10, to aid in the construction of highways.

Section 1, art. 16, of the Constitution provides:

"The Legislature is directed to establish a Department of Highways, and shall have power to create improvement districts and provide for building and maintaining public roads, and may provide for the utilization of convict and punitive labor thereon."

It has been held by this court in *Riley v. Carico et al.*, 27 Okla. 33, 110 Pac. 738, that said section was correlative to section 3 of the same article, which provides:

"The Legislature shall have power and shall provide for a system of levees, drains, and ditches and of irrigation in this state when deemed expedient, and provide for a system of taxation on the lands affected or benefited by such levees, drains and ditches and irrigation, or on crops produced on such land, to discharge such bonded indebtedness or expenses necessarily incurred in the establishment of such improvements; and to provide for compulsory issuance of bonds by the owners or lessees of the lands benefited or affected by such levees, drains and ditches or irrigation."

It was also held in said case that the word "tax," as applied to general taxation, which would include an *ad valorem* taxation, does not include an assessment for benefits under section 3, art. 16. Obviously the bonds authorized to be issued under said section 3 must be issued solely on the benefit plan.

Section 1 appears to be a special grant of authority to create improvement districts and to provide for building and maintaining public roads and to authorize the utilization of convict and punitive labor thereon. If this section contemplates, by the manner therein proposed, the building of such roads, other than on

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the benefit plan, then there would be no limitation on the levying of taxes on an *ad valorem* basis for such purposes. Such a construction would not be within the spirit of, and in harmony with, section 9, art. 10.

It was the intention of the Legislature to provide for the establishment of a department of highways and the creation of improvement districts for the building and maintaining of public roads on the benefit plan. However, this was not exclusive and would not prevent the county or township from issuing bonds within the limitation of section 26, art. 10, to aid in the construction of public highways.

It follows that the act here under consideration is repugnant to section 9 of article 10 of the Constitution, and of no effect.

The judgment of the lower court is affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

SCHAFFER v. BOARD OF COM'RS OF MUSKOGEE COUNTY.

No. 3612. Opinion Filed June 25, 1912.

(124 Pac. 1069.)

1. **STATUTES—Construction—Mistakes.** Where words have been erroneously used in a statute and the context affords the means of correction, the proper words will be deemed substituted.

2. **CLERKS OF COURTS—Compensation—Statutes—"Clerk of the County Court."** Section 15a of chapter 69, Sess. Laws 1910, provides that the clerk of the county court shall receive as full compensation in counties having over 50,000 population not to exceed $125 per month. Section 30 of the same act provides that "the clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds shall receive as their full compensation the following salaries: In counties having a population of not to exceed 7,000: The clerk of the district court and register of deeds, per annum, $1,000.00. The county clerk and clerk of the county court, per annum, $1,000.00. The treasurer, per annum, $900.00." **Held,** that the words "clerk of the county court" were erroneously used,

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and that the words "clerk of the superior court" should be deemed substituted therefor.

(Syllabus by the Court.)

Error from District Court, Muskogee County; R. P. de Graffenried, Judge.

Claim of Charles Schaffer against the Board of County Commissioners of Muskogee County. From a judgment of the district court on appeal from an order disallowing the claim in part, the plaintiff brings error. Affirmed.

Chas. A. Moon, for plaintiff in error.

W. E. Disney, Co. Atty., for defendant in error.

DUNN, J. This case presents error from the district court of Muskogee county. The controversy grows out of a refusal on the part of the board of county commissioners of the said county to allow a claim in the sum of $250 against the salary fund in favor of plaintiff in error for services as clerk of the county court for the month of December, 1911. The claim was allowed in the sum of $125, and disallowed in the sum of $125, from which action plaintiff in error on the 11th day of January, 1912, appealed to the district court, where the cause was tried, on an agreed statement of facts setting up that the said plaintiff was clerk of the county court of Muskogee county, and had been such clerk since January 8, 1911, the filing with the board of county commissioners and action thereon of his claim, as above stated, and that the population of Muskogee county was more than 50,000. Thereafter, and on the 12th day of February, the court made its findings of fact substantially the same as set forth in the agreed statement filed by counsel, and stated its conclusions of law thereon as follows:

"The court further finds, as conclusions of law, that the salary of the clerk of the county court of Muskogee county is fixed by section 15a of chapter 69 of the Session Laws of Oklahoma, 1910, to be the sum of $125 per month."

Judgment was entered accordingly, from which action appeal has been lodged in this court on a transcript of the record.

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The Legislature in 1910 passed an act entitled "County Fee and Salary Law" (chapter 69, Sess. Laws 1910), section 15 of which created the office of clerk of the county court. Section 15a thereof provided that "the clerk of the county court shall receive as full compensation the following amount to be allowed by the board of county commissioners, payable monthly * * * in counties having over 25,000 population, not to exceed $125 per month." Section 30 of the same act provides:

"The clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds shall receive as their full compensation the following salaries: In counties having a population of not to exceed 7,000: The district clerk and register of deeds, per annum, $1,000.00. The county clerk and clerk of the county court, per annum, $1,000.00. The treasurer, per annum, $900.00."

Here follows a scale of population of the counties with a corresponding scale of salaries.

It is the contention of counsel for plaintiff that section 30 of chapter 69, Sess. Laws 1910, repealed section 15a of the said act. On the other hand, it is the contention of counsel for defendant that that portion of the tabulated subdivision of section 30, *supra,* which reads, "the county clerk and the clerk of the county court, per annum, $1,000.00," is, so far as the same says "clerk of the county court," a mistake, and that it was the intention of the lawmaking authority to include the "clerk of the superior court" in the tabulated subdivision referred to instead of the "clerk of the county court."

It will be noted that section 15a, *supra,* specifically provides for the full compensation of the clerk of the county court, and that section 30 provides for the compensation of the "clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds," and no mention is made of the "clerk of the county court" except in the tabulated subdivision thereof, and in which tabulated subdivision reference is not made to the "clerk of the superior court," about which office, along with the others, the section is specifically dealing. In taking this view, therefore, we are confronted with the question of whether or not this court, having ascertained the

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intention of the Legislature, may substitute the words "clerk of the superior court" for the words "clerk of the county court" in the statute so as to give it the effect intended.

While we are not unmindful of the dangers attending the exercise of such powers by the court, yet in an unbroken line of authorities it is held that, "wherever one word has been erroneously used for another, and the context affords the means of correction, the proper word will be deemed to be substituted." 2 Lewis' Suth. Stat. Const. (2d Ed.) sec. 383; Endlich on Int. of Stats. secs. 295, 319, and cases therein cited; *Territory ex rel. v. Clark,* 2 Okla. 82, 35 Pac. 882; *Stiles, Treasurer, et al. v. City of Guthrie,* 3 Okla. 26, 41 Pac. 383; *State ex rel. v. Hooker,* 22 Okla. 712, 98 Pac. 964; *State v. Hooker,* 26 Okla. 460, 109 Pac. 527; *Haney v. State,* 34 Ark. 263.

Discussing this rule, the Supreme Court of Arkansas in the case of *Haney v. State, supra,* said:

"It is very true, as a general rule of construction, that, where the language of an act is plain and unambiguous, the court must give it effect, as it stands, or declare the law unconstitutional. But this rule is subject to much qualification, and does not apply to cases of plain clerical errors, where it is obvious that the Legislature did not intend to use the word as written, and it is further apparent what word they did intend. A mistake of this nature may be corrected by the courts, upon as sound principle as the mistake in a deed. It is not judicial legislation, nor judicial interference with the legislative will. It is in support of the legislative will, and wholly distinct from the reprehensible practice of warping legislation to suit the views of the courts as to correct policy. The only conditions to be observed in the exercise of the power of literal correction are that the courts should be thoroughly and honestly satisfied of the legislative intent, irrespective of the policy of the act."

In the following cases, words were changed so as to give to the statute the legislative intent: "Acts" was read "act" (*Jocelyn v. Barrett,* 18 Ind. 128); "venire" was read "venue" (*Graham v. Railroad Co.,* 64 N. C. 631); "final judgments" was read "penal judgments" (*Moody v. Stephenson,* 1 Minn. 401 [Gil. 289]); "first day of July" was read "first Monday in July" (*Burch v. Newbury,* 10 N. Y. 374); "county" was read "city"

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(*Lancaster County v. Frey*, 128 Pa. 593, 18 Atl. 478); "plaintiff" was read "defendant" (*Hooper v. Birchfield*, 115 Ala. 226, 22 South. 68); "all civil and criminal business" was read "all civil and criminal causes of action" (*White v. Rio Grande Western Ry. Co.*, 25 Utah, 346, 71 Pac. 593). Instances wherein the courts have changed the wording of a statute could be noted at length, but we deem the above sufficient.

In the case at bar we are thoroughly satisfied that the Legislature, when it used the words "clerk of the county court" in the tabulated subdivision of section 30 of chapter 69, Sess. Laws 1910, intended the words "clerk of the superior court" instead, and the lower court in so holding was correct.

The judgment of the trial court is accordingly affirmed.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

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THE

SUPREME COURT,

STATE OF OKLAHOMA

JULY TERM, 1912

PRESENT:

JOHN B. TURNER, CHIEF JUSTICE.
SAMUEL W. HAYES, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
MATTHEW J. KANE,
JESSE J. DUNN,
JUSTICES.

SHANNON *et al.* v. STATE *ex rel.* DAVIDSON *et al.*

No. 3697. Opinion Filed March 26, 1912.

Rehearing Denied July 18, 1912.

(125 Pac. 1106.)

COUNTIES—Indebtedness—Allowance of Claims. By virtue of section 9 of an act of the Legislature entitled "An act relating to the issuance of warrants or certificates of indebtedness," etc. (Sess. Laws 1910-11, p. 180), the board of county commissioners is without authority to allow and approve a claim against any fund of the county, or to order a warrant therefor issued on such fund, where, during the fiscal year in which the claim is presented, claims have already been allowed and approved on such fund equal to the estimate made and approved by the excise board for such fund for the current fiscal year; and this is true, although there be to the credit of such fund a balance unexpended, derived from the taxes and revenues collected during the preceding year.

(Syllabus by the Court.)

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Error from District Court, Creek County;
Wade S. Stanfield, Judge.

Mandamus, on the relation of Holmes Davidson and another, against L. O. Shannon and others. Judgment for relators, and defendants bring error. Reversed and remanded, with directions.

W. Morris Harrison, for plaintiffs in error.

McDougal & Lytle, for defendants in error.

HAYES, J. This action was brought in the court below, on relation of defendants in error, Holmes Davidson and Theodore Berryhill, as guardian of Earl Berryhill, who will be hereafter referred to as relators, to compel by mandamus plaintiffs in error, constituting the board of county commissioners of Creek county, to approve certain claims of relators against the county, and to order warrants drawn therefor.

The judgment of the trial court sought to be reversed by this proceeding awarded the peremptory writ as prayed for by relators. The trial in the court below was upon an agreed statement of facts, which, in so far as they are material to the question presented by this appeal, are as follows:

Relator Holmes Davidson is the county jailer of Creek county and has in his care and custody the state and county prisoners confined in the county jail, and is charged with the duty of boarding and keeping them. The county, it is admitted, is indebted to him for the board of the prisoners in the sum of $363; that relator has rendered and filed his account therefor in due form, as required by law. It is admitted that said claim is correct and due by the county, and is a proper charge against the contingent fund of the county; but the board of county commissioners refused to allow said claim, and to order a warrant issued therefor, for the reason that the estimate approved and allowed by the excise board for the fiscal year 1911-12 for the contingent fund was exhausted. Relator Earl Berryhill is the owner of a building rented and occupied by the county, and it is admitted that the county is indebted to him as rents thereon in the sum of $780; that an account therefor has been duly made and presented to the

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board of county commissioners for the allowance; that said claim is a just charge against the court fund of the county, but that the county commissioners refused to allow said claim, for the reason that the estimate approved and allowed by the excise board for the court fund for the fiscal year 1911-12 has been exhausted. Although warrants have been drawn against the contingent and court funds of the county in an amount equal to the estimate made and approved for said funds for the fiscal year 1911-12, it is admitted that there is a balance on hand in the county treasury to the credit of the contingent fund in the sum of $1,062; and a balance to the credit of the court fund in the sum of $24,000, which said sums were paid into the treasury as taxes under the levy made for the fiscal year 1910-11; and that all charges against said funds for the fiscal year 1910-11 have been paid.

The sole question presented by the record in this proceeding is whether, under the provisions of an act of the Legislature approved March 15, 1911, entitled "An act relating to the issuance of warrants and certificates of indebtedness," etc. (Sess. Laws 1910-11, p. 180), the board of county commissioners is authorized to allow claims against any fund in any fiscal year in excess of the estimate made and approved for such fund for said year, by reason of the fact that there is cash on hand in the treasury to the credit of such fund left over from the taxes levied and collected during the preceding year. Section 2 of the act makes it the duty of every officer authorized to allow, issue, or draw warrants against the public funds of any county to number them in their numerical order as they are issued on each fund, beginning with number 1, and issue them consecutively each fiscal year; and the series for each year is required to be designated by writing the fiscal year on the warrant for which the levy to pay same has been made.

Section 4 requires that:

"Each and every warrant or certificate of indebtedness must be drawn against a specific fund, and there shall be shown on such warrant or certificate of indebtedness by the officer or person issuing, drawing, or attesting same, the amount of the estimate made and approved for such purpose for the fiscal year or the specific

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amount authorized by a bond issue for said purpose; the amount of warrants or certificates of indebtedness issued or drawn against said fund and the net balance to the credit of said fund."

Section 6 provides that:

"Warrants and certificates of indebtedness may be issued to the amount of the *estimate made and approved by the excise board for the current fiscal year* or to the amount authorized for such purpose by a bond issue." (Italics ours.)

Section 7 makes it unlawful for any officer to issue, approve, sign, attest, or register any warrant or certificate of indebtedness in any form in excess of the estimate of expenses made and approved for the current fiscal year, and renders a warrant so issued invalid against the county, and makes the officer issuing same and his bondsmen liable therefor.

Section 9 reads as follows:

"It shall be unlawful for the board of county commissioners, the city council or the commissioners of any city, the trustees of any town, board of education, township board, school district board or any member or members of the aforesaid commissioners, or of any of the above-named boards, to make any contract for, incur, acknowledge, approve, allow or authorize any indebtedness against their respective municipality or authorize it to be done by others, in excess of the estimate made and approved by the excise board for such purpose for such current fiscal year, or in excess of the specific amount authorized for such purpose by a bond issue. Any such indebtedness, contracted, incurred, acknowledged, approved, allowed or authorized in excess of the estimate made and approved for such purpose for such current fiscal year or in excess of the specific amount authorized for such purpose by a bond issue, shall not be a charge against the municipality whose officer or officers contracted, incurred, acknowledged, approved, allowed or authorized or attested the evidence of said indebtedness, but may be collected by civil action from any official contracting, incurring, acknowledging, approving or authorizing or attesting such indebtedness, or from his bondsmen."

It is plain that the foregoing section makes it unlawful for respondents in this case to approve the claims of relators, unless the term "estimate made and approved" for any current fiscal year includes a balance left over to the credit of any fund from the taxes collected during a previous year, but that the term "estimate made and approved" has no such meaning seems clearly

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to be foreclosed by other provisions of the act; for the Legislature has, by section 3, defined this term in the following language:

"The term 'estimate made and approved' as used herein is defined to mean the itemized statement of the estimated needs of a municipality for its current expenses for the ensuing fiscal year, as approved and fixed by the excise board or by vote of the municipality, adding thereto the amount necessary to create a sinking fund to meet maturing bonds, judgments and interest coupons, but the amount or limit to which warrants and certificates of indebtedness may be issued, shall not include the ten per cent. to be added to the estimate for the delinquent taxes."

Applying this definition to the language in section 9, it is plain that the effect of that section is to limit the approval of claims by the board of county commissioners, not to the amount of funds that may be in the treasury at any time, or that may be received into the treasury during any fiscal year, but to the estimate of expenses made and approved by the excise board for that year. In other words, when a claim is presented to the county commissioners, in order for them to determine their authority relative to approving same, they are required to look, not to the condition of the account in the treasury, but to the amount of the estimate made and approved by the excise board, and the total amount of warrants or certificates already drawn against the fund for that year. If the amount of warrants previously drawn during the fiscal year, including the claim presented, does not exceed the amount of the estimate made and approved for that year by the excise board, the claim may be approved and a warrant ordered issued; but, if the amount of warrants previously issued, including the claim presented for allowance, exceeds the estimate made and approved for the fund against which the claim is a charge for any year, then there is nothing in the statute that authorizes the board to allow same, although there may be money in the treasury credited to such fund for previous years, but not exhausted by the charges against the fund for said years. To sustain relators' contention that the board of county commissioners are under duty to allow their claims because of the balance in the fund, derived from the taxes of a previous year, would be to extend the meaning of the terms of this statute as specifically

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defined by the statute itself. It is apparent that the Legislature intended that the terms of the statute should have a definite, fixed, unmistakable meaning, requiring no construction, because the statute has defined them, and has made the officers who violate the statute by approving claims or drawing warrants in excess of the amount authorized thereby liable personally for such warrants or claims, and subjects them to prosecution for misdemeanor, and upon conviction to a fine of not less than $100 nor more than $1,000, and a forfeiture of their office.

Section 3 of an act of the Legislature entitled "An act to provide for the levying of taxes on *ad valorem* basis," etc., approved March 17, 1910 (chapter 64, p. 109, Sess. Laws 1910), creates in each organized county in the state an excise board, to be composed of the county clerk, county treasurer, county judge, county superintendent, and county attorney, who shall perform the duties thereinafter provided.

Section 4 makes it the duty of the excise board to meet at the county seat on the last Saturday in July of each year, for the purpose of examining the estimates of expenses of the county and for each city and incorporated town, township, and school district in the county, and to revise and correct any such estimate, where the amount thereof is in excess of the just and reasonable needs of the municipality for which same is made; and when they have approved each estimate, if the same is within the limits for current expenses provided for by section 1 of the act, said board shall then ascertain the assessed valuation of property taxed *ad valorem* in the county, and then shall ascertain the probable income of the county and of each municipality or division thereof, other than *ad valorem* taxes, and then they shall make a levy sufficient to meet the expenses of the current year as approved in said estimates, and additional amounts necessary to provide a sinking fund to pay at maturity all bonded indebtedness of the county. Added to this amount, there shall be levied 10 per centum additional for delinquent taxes.

We think the Legislature by this section intended to provide, and does provide, that the excise board, in arriving at what amount of taxes shall be necessary to be levied in any year upon *ad*

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valorem basis in any county, shall first ascertain the probable income of the county for that year from all sources, including any balance that may be available from the revenues collected by the county during the preceding year or years unexpended; that such total income from all sources shall then be deducted from the estimate approved and allowed for the current year, and a sufficient levy of taxes upon *ad valorem* basis shall then be made by the board to raise the additional sum necessary under the estimate approved, unless such amount shall require a rate exceeding the rate fixed by the statute. The excise board may consider at such time the balance to the credit of any fund in the county treasury, for the purpose of determining the amount of taxes necessary to be levied; but when the board of county commissioners is called upon to approve or allow any claim against any fund of the county, or any officer, whose duty it is to issue a warrant when such claim is allowed, is called upon to issue such warrant, they may look only to the estimate made and approved by the excise board, and to the amount of claims allowed or warrants already issued thereunder during such fiscal year, to determine whether they are authorized to approve the claim, or to issue a warrant therefor. This view seems to us to be in entire harmony with the purpose of both the foregoing acts of the Legislature, and to be the only procedure authorized by the plain language of the statute; and to give it any other meaning would be to legislate additional language into a statute whose language is not sufficiently ambiguous to require construction.

We are not unaware that this rule may operate to embarrass the administration of affairs in some counties, where the estimates made and approved by the excise board have proven insufficient to meet the expenses of the county; but it is an embarrassment that flows from the operation of the plain letter of the statute, and the courts are not justified in going beyond the law expressed in a plain statute, although to do so might relieve a difficult situation.

The validity or constitutionality of the act involved has not been questioned.

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It follows from the foregoing views that the judgment of the trial court should be reversed and the cause remanded, with directions to dismiss.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

LUDWIG v. BENEDICT.

No. 3321. Opinion Filed May 14, 1912.

Rehearing Denied July 19, 1912.

(125 Pac. 739.)

1. **APPEAL AND ERROR—Record—Scope and Contents—Motion for New Trial.** A motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal.

2. **SAME—Instructions—Necessity for Motion for New Trial.** Rulings on instructions and exceptions thereto cannot be considered, unless the instructions are excepted to at the trial, the exceptions made to appear of record, and the objections pointed out to the trial court on motion for new trial.

(Syllabus by the Court.)

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action between William H. Ludwig and John D. Benedict. From the judgment, Ludwig brings error. Dismissed.

Bailey & Wyand, for plaintiff in error.

Murphey & Noffsinger, for defendant in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss the appeal upon the following grounds: (1) Because the plaintiff in error has failed to attach to his petition in error a case-made and a bill of exceptions, preserving the evidence and such rulings and orders of the trial court as are not by statute made a part of the record. (2) Because none of the errors complained of were presented to the trial court by a motion for

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a new trial. (3) Because the record does not show any motion for a new trial, or the rulings of the court thereon. (4) Because the evidence, motions, and orders of the trial court that are not a part of the record, unless made so by a bill of exceptions or case-made, have not been preserved, and are not a part of the record in this case. (5) Because the petition in error presents no question for the consideration of the court, independent of the evidence and other orders, rulings, and acts of the court that have to be, by law, made a part of the record by a case-made or bill of exceptions.

The motion to dismiss must be sustained. The plaintiff in error attempts to appeal by attaching to his petition in error what he calls a "transcript of the record," which contains a certified copy of the summons, the return of the officer thereon, the petition of the plaintiff, the answer of the defendant, and the reply. It also contains what is designated as instructions asked by plaintiff and refused by the court, and the exceptions noted, the verdict of the jury, and the motion for a new trial. It is apparent that a motion for a new trial was necessary to bring to this court for review the errors complained of. It has been many times held by this court that a motion for a new trial copied into a transcript constitutes no part of the record, and will not be considered by the Supreme Court on appeal. *McMechan v. Christy,* 3 Okla. 301, 41 Pac. 382; *Black v. Kuhn,* 6 Okla. 87, 50 Pac. 80; *Kingman & Co. v. Pixley,* 7 Okla. 351, 54 Pac. 494; *Menten v. Shuttee,* 11 Okla. 381, 67 Pac. 478; *McCarthy v. Bentley,* 16 Okla. 19, 83 Pac. 713; *Davis v. Lammers,* 23 Okla. 338, 100 Pac. 514; *Tribal Development Co. v. White Bros.,* 28 Okla. 525, 114 Pac. 736.

Counsel for plaintiff in error contend that the instructions given and refused, when filed, form part of the record proper, and need not be incorporated into the case-made or bill of exceptions, in order to be reviewed by this court. It is well settled in this jurisdiction that rulings on instructions, and exceptions thereto, cannot be considered, unless the instructions are excepted to at the trial, the exceptions made to appear of record, and the objections pointed out to the trial court on motion for new trial.

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Boyd v. Bryan, 11 Okla. 56, 65 Pac. 940; *Glaser et al. v. Glaser et al.,* 13 Okla. 389, 74 Pac. 944; *Southwestern Cotton Seed Oil Co. v. Bank of Stroud et al.,* 12 Okla. 168, 70 Pac. 205; *Martin et al. v. Gassert,* 17 Okla. 177, 87 Pac. 586.

The appeal must be dismissed. It is so ordered.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

CRAIG v. GREER, *Sheriff, et al.*

No. 3843. Opinion Filed May 14, 1912.

Rehearing Denied July 19, 1912.

(124 Pac. 1096.)

APPEAL AND ERROR—Record—Motions. Motions presented to the trial court, the rulings thereon and exceptions thereto, are not properly a part of the record, and can only be presented and preserved for review on appeal to the Supreme Court by means of a bill of exceptions or case-made.

(Syllabus by the Court.)

Error from District Court, Canadian County; Jno. J. Carney, Judge.

Action between Hester Craig and C. O. Greer, sheriff, and others. From the judgment, Hester Craig brings error. Dismissed.

Jas. R. Lewis, for plaintiff in error.

Jas. L. Brown, for defendants in error.

WILLIAMS, J. This proceeding in error is to review the order of the lower court dissolving a temporary injunction. No case-made is attached to the petition in error.

A motion to dismiss has been filed upon such ground; the contention being that the error sought to be reviewed cannot be brought before this court on a transcript.

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The proceeding in error must be dismissed. *Green et al. v. Incorporated Town of Yeager,* 23 Okla. 128, 99 Pac. 906; *Lamb et al. v. Young et al.,* 24 Okla. 614, 104 Pac. 335; *Nelson et al. v. Glenn et al.,* 28 Okla. 575, 115 Pac. 471; *Tribal Development Co. et al. v. White Bros. et al.,* 28 Okla. 525, 114 Pac. 736; *Richardson et al. v. Beidleman, post,* 126 Pac. 816-818.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

Ex parte RIGGERT.

No. 4035. Opinion Filed July 20, 1912.

(125 Pac. 485.)

1. **CRIMINAL LAW—Judgment—Correction.** Where a defendant is tried, convicted, and sentenced to imprisonment, but, by the error of the clerk, the judgment is not entered on the records of the court, the error may be corrected at any time by an order **nunc pro tunc.** Following **Ex parte Lydia Howland,** 3 Okla. Cr. 142, 104 Pac. 927, Ann. Cas. 1912A, 840.

2. **SAME—Execution of Sentence—Imprisonment.** The prisoner having been formally convicted, and not having served his sentence, and the judgment of conviction not being stayed as provided by law, he may be apprehended as on escape and placed in custody on the unexecuted judgment.

   (a) Expiration of time, without imprisonment, is in no sense an execution of the sentence. Following **Ex parte John Eldridge,** 3 Okla. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967.

(Syllabus by the Court.)

Original petition by H. Riggert for writ of *habeas corpus.* Petition denied.

Pruiett, Sniggs & Wilson, for petitioner.

Smith C. Matson, Asst. Atty. Gen., opposed.

WILLIAMS, J. On June 4, 1912, the petitioner petitioned this court for his discharge under writ of *habeas corpus.* The facts appear to be as follows:

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Ex parte Riggert.

In State of Oklahoma v. H. Riggert, No. 1,835, in the county court of Oklahoma county, the defendant was proceeded against by information for the crime of selling intoxicating liquor. In February, 1910, he was duly tried before said court, and the jury returned a verdict of guilty thereon. On April 21, 1910, he was sentenced to confinement in the county jail of Oklahoma county for a period of 60 days, and adjudged to pay a fine of $200 and costs, all of which appears from the journal entry. Afterwards an appeal was prosecuted to the Criminal Court of Appeals. On November 11, 1911, said appeal was dismissed. 6 Okla. Cr. 338, 118 Pac. 616.

On May 22, 1912, an order of commitment was issued, and the petitioner was incarcerated under said sentence. Prior to said date, both by the district court of Oklahoma county and the Criminal Court of Appeals, on an application for *habeas corpus,* upon the ground that no proper entry had been made of the judgment sentencing the prisoner in accordance with the verdict, the petitioner was released upon *habeas corpus;* but thereafter, by a *nunc pro tunc* order, such judgment was duly entered in said county court in accordance with the verdict of the jury. The petitioner having been apprehended, after the entering of said judgment *nunc pro tunc,* said commitment was issued.

In *Ex parte Howland,* 3 Okla. Cr. 142, 104 Pac. 927, Ann. Cas. 1912A, 840, it was held by the Criminal Court of Appeals:

"Where a defendant is tried, convicted, and sentenced to imprisonment, but, by error of the clerk, the judgment is not entered on the records of the court, the error may be corrected at any time by an order *nunc pro tunc.*"

In *Ex parte John Eldridge,* 3 Okla. Cr. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967, it was held by the same court that:

"Where a convicted defendant is at liberty and has not served his sentence, and the same is not stayed as provided by law, he may be arrested as on escape and ordered into custody on the unexecuted judgment."

And, further, that:

"Expiration of time, without imprisonment, is in no sense an execution of the sentence."

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These decisions by the Criminal Court of Appeals, under the rule announced in *Ex parte Tom Anderson, ante,* 124 Pac. 980, will be followed by this court.

It is insisted that the rule announced in *Ex parte John Eldridge, supra,* is in conflict with that announced by this court in *Ex parte Clendenning,* 22 Okla. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628. It is not essential here to determine whether such conflict exists; for, under the rule announced in *State ex rel. Ikard v. Russell, Judge, ante,* 124 Pac. 1092, as to all such matters we follow the construction of the Criminal Court of Appeals.

The petition for writ of *habeas corpus* is denied.

HAYES and KANE, JJ., concur; TURNER, C. J., and DUNN, J., absent, and not participating.

TYLER COMMERCIAL COLLEGE v. STAPLETON.

No. 688. Opinion Filed July 23, 1912.

(125 Pac. 443.)

1. **FRAUDS, STATUTE OF—Contracts Relating to Real Property—Effect of Performance.** The owner of a building leased same to a corporation for a period of three years at a stipulated rental of $75 per month. The lessee, after the expiration of about one year, by parol agreement, assigned the lease. The assignee took possession of the demised premises, paid the purchase price for the lease, and performed the covenants thereof by paying for a time the monthly rentals to the lessor, as provided in the lease contract; but, before the expiration of the lease, the assignee abandoned the premises and refused to pay the rents for the unexpired term. **Held,** that the assignment of the lease was in violation of the statute of frauds, and void (section 1089, Comp. Laws 1909), but that the acts of the assignee relieved it from the operation of the statute, and that the assignee was liable to the lessor for the full term of the lease.

2. **LANDLORD AND TENANT—Assignment of Lease—Liability of Assignee.** The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues.

3. **SAME.** An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents.

(Syllabus by the Court.)

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Error from District Court, Logan County;
A. H. Huston, Judge.

Action by Alta Z. Stapleton against the Tyler Commercial College. Judgment for plaintiff, and defendant brings error. Affirmed.

Tibbetts & Green, for plaintiff in error.

C. G. Hornor, for defendant in error.

HAYES, J. Defendant in error, hereinafter called plaintiff, brought this action in the court below against plaintiff in error, hereinafter called defendant, to recover the balance due her as rents on a certain building located in the city of Guthrie. She alleges in her petition and amendments thereto that she leased to the Capital City Business College, a corporation, certain rooms in her building, in the city of Guthrie, for a period of three years, beginning on January 1, 1904, and expiring January 1, 1907; that the Capital City Business College took possession of said rooms under the lease, and retained them and paid the rents thereon until the month of October, 1904, at which time it sold, assigned, and delivered to defendant said lease contract and possession of said rooms. She further alleges that defendant assumed said lease contract, and agreed with the Capital City Business College, for a good and valuable consideration, to pay the rent thereunder to the plaintiff in the sum of $75 per month for the full, unexpired term of said contract. She alleges that defendant occupied said premises and paid the rents thereon until September 27, 1905, at which time it vacated the premises and thereafter refused to pay the rents. She alleges that after the premises had been vacated by defendant, and it had refused to pay further rents thereon, she took possession of the premises, and, after making certain repairs, was able to re-rent the premises only at a reduced rent. She prays judgment for the amount of the rents at the rate of $75 per month, as stipulated in the contract, for the time the building stood vacant after the same was vacated by defendant, and for the difference in the rental provided for in the contract and the amount she was able to re-rent the building for, after

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the same was vacated by defendant, for the remainder of the term.

After answer of defendant, admitting several of the allegations of the petition, but denying that it assumed the lease, or that it agreed to pay the rents to plaintiff thereunder for the remainder of the term, the cause was tried to the court, without a jury, who made findings of fact and conclusions of law in part as follows:

"(1) Upon a consideration of the evidence, the court finds that on and prior to the 28th day of November, 1903, the plaintiff was the owner of the real estate described in her petition and the lease attached thereto, and that on said date she executed and delivered to the Capital City Business College, a corporation, a lease for said premises to continue for the term of three years from the 1st day of January, 1904, until the 1st day of January, 1907, and for which said corporation was to pay her the sum of $2,700, payable in monthly installments of $75 each at the beginning of each month.

"(2) That on or about the 1st of November, 1904, the Capital City Business College sold out all of its assets to certain individuals, who immediately transferred the same to the defendant, the Tyler Commercial College, a corporation, and that the Capital City Business College was by said transfer of all of its assets in effect dissolved, and it ceased to exist as a corporation thereafter, and that the defendant, Tyler Commercial College, succeeded to all of its assets, property, contracts, rights, and good will.

"(3) That the defendant, the Tyler Commercial College, continued to carry on business in the city of Guthrie under the name of the Capital City Business College, and continued to operate the business college and to occupy the premises of the plaintiff up until the 30th day of September, 1905, and paid to her the rent stipulated in the lease.

"(4) That on the 17th day of August, 1905, the defendant served a written notice upon the plaintiff that it would terminate its tenancy and would vacate the premises on or about the 30th day of September, 1905, and that it did vacate the premises described on the 30th day of September, 1905.

"(5) That in payment of the September, 1905, rent, the defendant sent to the plaintiff a check, upon which was written in small letters, 'House rent, in full of implied contract;' and the court also finds that the plaintiff did not see or observe the same before cashing the check.

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"(6) That after said premises were vacated by the defendant the plaintiff expended the sum of $500 in rearranging the interior of the building for another tenant.

"(7) That on the 15th day of December, 1905, the plaintiff re-rented said premises to another tenant for the sum of $40 per month, and has continued to receive from such other tenant the sum of $40 per month on and through the remainder of the term fixed in the lease."

CONCLUSIONS OF LAW.

"(1) From which the court concludes that the original lease from the plaintiff to the Capital City Business College was a valid lease, and binding upon the Capital City Business College, and that the defendant, Tyler Commercial College, in succeeding to all of the assets, property, and good will of the Capital City Business College, and under its rights under the lease, became liable for its contracts, and liable to perform its contract to pay the rent stipulated under this lease."

Other conclusions of law were made by the trial court; but it is not necessary to set them out here. The judgment was for the plaintiff, as prayed for, except that she was not allowed for money expended in repairing the building and remodeling it, in order to rent it after it had been vacated by defendant.

There was a motion for a new trial by defendant, urging as one of the grounds for a new trial that the findings of the court were not supported by the evidence; and the overruling of this motion is assigned as error in the petition in error. But in defendant's brief this assignment is not set out; nor is it pointed out in the brief what findings of the court are without sufficient evidence to support them. It therefore must be taken by this court that the finding of the court upon the facts is correct.

There is no specific finding of the court that the Capital City Business College, by any written contract, ever assigned the lease to defendant; and there is absence of any evidence in the record to that effect. Nor is there any separate, specific finding that the Capital City Business College otherwise sold and assigned the lease to defendant; but we construe finding of the court, numbered 2, in which it is found that all the assets of the Capital City Business College were transferred to certain

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persons, and that those persons transferred same to defendant, to be in effect a finding that there was a parol assignment of said contract; and counsel for defendant, in their brief, have dealt with the case upon the theory that there was a parol assignment to defendant by the Capital City Business College of its lease with plaintiff. Defendant contends, first, that such parol assignment is within the statute of frauds, and therefore void; second, that the taking of possession of the demised premises by defendant, and the payment of rents thereon for the portion of the term defendant occupied the premises, does not relieve the parol assignment from the operation of the statute of frauds; and, third, that if such performance does relieve the parol assignment of the statute, an assignee of a leasehold interest is liable for the rents only for the time he occupied the premises; and that, as it has paid all rents maturing before it vacated the premises, no recovery by plaintiff can be had against it.

Some of the cases support the last of defendant's foregoing contentions; but the decided weight of authority, consisting both of decided cases and the text-books, does not support this rule. At page 1087, Underhill on Landlord and Tenant, it is said:

"Where the lessee makes an absolute assignment of the whole term, the assignee thereby becomes responsible, after he has accepted the assignment, for rent subsequently accruing, and for the subsequent breach of covenants running with the land, though he never takes possession of the premises. The assignee of a lease becomes liable for rent by reason of privity of estate, and not by reason of occupation of the premises. This is the general rule, and is well supported by the authorities. The apparent exceptions to it, which make the liability of the assignee of the lease to the lessor depend upon the possession, are usually distinguished by some other element than the possession."

The liability of the assignee to the lessor is based upon privity of estate, and, so long as that privity of estate continues to exist, the assignee's liability continues; and it cannot be terminated by removal from the premises and refusal to pay rents. It may be terminated by a valid assignment of the entire unexpired term to any other person; for a valid assignment terminates the privity of estate between the first assignee and the lessor. *Bonetti v.*

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Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151, where the cases supporting this doctrine are well collected in a note. See, also, section 181b, and section 158c, Tiffany on Landlord and Tenant.

Kimbriel v. Montgomery, 28 Okla. 743, 115 Pac. 1013, is relied upon by defendant as deciding favorably to it its contention that it is not liable to the plaintiff lessor for the rents; but that case has no application. One of the questions decided in that case was that the lessor could not recover from the sublessee the rents, and that the lessor must look to the original lessee. The distinction between the relation and liability of an assignee and a sublessee to the lessor is well defined by the authorities. There is neither privity of estate nor privity of contract between the sublessee and the lessor; but between the assignee and the lessor there is privity of estate, and the assignee is liable upon the covenants that run with the land. Section 449, Taylor on Landlord and Tenant; section 651, Underhill on Landlord and Tenant.

It follows in the instant case that, if any valid assignment was made to defendant by the Capital City Business College, defendant is liable; for the privity of estate created by such assignment was never terminated before the expiration of the term.

Section 780, subd. 5, Wilson's Rev. & Ann. St. (section 1089, subd. 5, Comp. Laws 1909), provides:

"An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, * * * is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Section 880, *Id.,* provides:

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors. * * *"

Whether, under the foregoing statutes, a lease for a term of less than one year may be assigned otherwise than in writing need not be determined; for in this case both the original term of the lease and the unexpired term at the time of the transfer of the lease to defendant was for a longer period than one year; and these statutes include such an assignment and require it to

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be in writing. 20 Cyc. 218; Taylor on Landlord and Tenant, sec. 427. There was no written assignment to defendant, and the parol assignment and transfer to it of the lease is therefore void, unless the doctrine of part performance applies and takes the contract out of the operation of the statute. This exact question has not often been considered by the courts of this country.

Welsh v. Schuyler, 6 Daly (N. Y.) 412, *Polk v. Reynolds,* 31 Md. 106, *Nally v. Reading,* 107 Mo. 350, 17 S. W. 978, *Chicago Attachment Co. v. Davis Sewing Machine Co.,* 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754, have been cited by defendant as supporting the rule that part performance does not take a parol assignment of a lease out of the statute of frauds, so as to authorize a lessor to recover rents in an action at law against the assignee. Neither *Polk v. Reynolds, supra,* nor *Welsh v. Schuyler, supra,* is in point. All that was decided in the Polk case was that a verbal agreement or understanding to transfer a leasehold interest in land falls within the statute of frauds, and is therefore void. In *Welsh v. Schuyler, supra,* the plaintiff lessor sought to recover rents from a person who had occupied the demised premises with the permission of the original lessee, and had paid a part of the rents to the plaintiff lessor. It was held by the court that defendant being in possession and paying rents to the lessor was presumptive evidence that he had accepted and held an assignment of the lease, but that he was not estopped to show that he never accepted a valid assignment of the lease; and that, where the lease was for a period greater than three years, an assignment, not in writing, is invalid, because in violation of the statute of frauds. The rule of part performance was not invoked by plaintiff nor considered by the court. The other two cases cited by defendant, however, are in point, and hold that the doctrine of part performance has no application in an action for rents by the landlord against the assignee under a parol assignment; but the court in each of those cases based its decision upon the rule prevailing in the respective states in which those cases arose, that, whatever might be the rule in equity as to such doctrine, it has no place in an action at law. That plaintiff may invoke the doctrine of part performance in this action is supported by the fol-

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lowing cases: *Dewey & Stone v. Payne & Co.*, 19 Neb. 540, 26 N. W. 248; *Baker v. Maier & Zobelein Brewery*, 140 Cal. 530, 74 Pac. 22; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Grant v. Ramsey*, 7 Ohio St. 158; *Browder et al. v. Phinney*, 30 Wash. 74, 70 Pac. 264.

The rule supported by these last-mentioned cases we believe to be based upon the sounder reason, and more conducive to justice under the Code of Procedure in force in this state. The contract here involved, and which it is charged, infracts the statute, does not create any estate in real estate, as does the lease contract. Whether the contract of assignment stands or falls does not affect the leasehold estate, which was granted by the original lease contract to the lessee; for that contract was in writing, and is valid. What was undertaken by the parol assignment was not to create an estate, but to convey an interest in real estate that had been created by the original lease contract and held by the lessee. This contract of assignment was capable of immediate performance by the execution thereof by the lessee and acceptance thereof by the assignee and payment of the consideration. The consideration was paid by the assignee to the extent that it paid for all the assets transferred by the Capital City Business College, the original lessee, to it, including the lease in controversy; and it had also performed the covenants of the lease for part of the time thereafter by payment of the rents, and had been in possession of the property, using and enjoying same. By our Code the distinction between actions at law and suits in equity is abolished, and all actions in which a civil remedy is sought are denominated civil actions. Section 5542, Comp. Laws 1909. Plaintiff, in his petition, is required to set up therein only a statement of the facts constituting his cause of action in ordinary and concise language, and make demand for the relief to which he thinks himself entitled (section 5627, Comp. Laws 1909); and defendant may set forth in his answer as many grounds of defense as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. Section 5634, Comp. Laws 1909. Under these provisions of the Code, defendant in the instant case could plead, in any action of ejectment that might be

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brought against it, either by the lessor or the original lessee, any equitable defenses it may have. *Meadors v. Johnson,* 27 Okla. 544, 112 Pac. 1121; *Talley et al. v. Kingfisher Imp. Co.,* 24 Okla. 472, 103 Pac. 591, 20 Ann. Cas. 352. And an equitable estate in land may, under our Code, be made the basis of an action for possession. *Shy v. Brockhause,* 7 Okla. 35, 54 Pac. 306; *McClung v. Penny,* 12 Okla. 303, 70 Pac. 404.

It would therefore follow, if the doctrine of part performance cannot be applied in the case at bar, that under the procedure in this state, if plaintiff, or if the lessee, brought an action to eject defendant from the premises, defendant could set up its equitable defense, its right to a specific performance of the contract, to defeat the action of ejectment, and secure the performance of the assignment to the extent that it could enjoy the full unexpired term of the original lease. This protection would be given to defendant in an action that, in the absence of our Code provisions, would be denominated an action at law; and yet, in a similar action, the court would refuse to enforce the covenants of the contract against defendant by requiring it to pay the rents. There is nothing in the statute that requires such a construction as will permit this inconsistent and inequitable administration of the law. In *Bard v. Elston,* 31 Kan. 274, 1 Pac. 565, from which state our Code was adopted, a plaintiff lessor sought, by an action of forcible entry and detainer, to eject his lessee under a parol lease for a term of six years from the demised premises. The lessee had been in possession of the land for a period of five years, had planted and cultivated crops thereon, built fences and houses, and made other improvements, and, in addition thereto, had paid the rents and taxes thereon. The court held that defendant might invoke the doctrine of part performance in his defense to the action, and that his acts had been sufficient to take the contract out of the statute and make it valid for the full term of the lease. In the opinion, written by Mr. Justice Valentine, concurred in by Mr. Justice Brewer, it was said:

"Mere possession or mere payment of rent will not, as a general rule, make a parol lease for more than one year valid for the full term. But parol leases exceeding one year, as well as

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other parol contracts with regard to real estate, may sometimes be taken out of the statute of frauds by a part performance of the contract, and by such part performance be made valid to their full extent. Taylor's Landlord and Tenant, sec. 32; *Grant v. Ramsey*, 7 Ohio St. 157. But parol leases for more than one year, in order to become valid by a part performance, should generally be such as would, by such part performance, become substantially a purchase of an interest in the real estate."

In *Deisher v. Stein*, 34 Kan. 39, 7 Pac. 608, there was a parol agreement to execute a written lease of land for a term of more than one year. After the lessee had gone into possession and expended labor, money, and material in making improvements on the land, and getting it into condition to enjoy, the landlord refused to execute the lease and ousted the lessee from possession. In an action by the lessee against the landlord to recover damages, it was held that the lessee's acts constituted such a part performance of the contract as to take it out of the statute sufficiently to enable him to recover for the time, labor, money, and material expended thereon as his damages.

In *Bard v. Elston, supra*, the equitable doctrine of part performance was invoked by the defendant; while in *Deisher v. Stein, supra*, it was invoked by the plaintiff, and constituted a part of his cause of action. In the latter case, it was said by the court in the opinion:

"It must be remembered that in Kansas all the old forms of action, and all distinctions between actions at law and suits in equity, are abolished, and in their stead only one form of action is recognized, called a civil action; and in this form of action all that a plaintiff needs to do in stating his cause of action is to state the facts of his case; and if such facts would entitle him to recover in any form of action, either at law or in equity, he will be entitled to recover under such statement."

Speaking of what performance is necessary to relieve a contract for the sale of real estate or interest therein of the operation of the statute, this court, in *Collins v. Lackey et al.*, 31 Okla. 776, 123 Pac. 1118, said:

"The authorities are practically unanimous that payment of the purchase price and taking possession under the contract and making valuable improvements on the granted premises constitute such a performance of the contract as will warrant a decree

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of specific performance. There is some division in both the English and the American authorities as to whether taking possession alone under the contract, without making valuable improvements, is sufficient to take the contract out of the operation of the statute. The weight of authority, both in England and in this country, however, supports the rule that possession alone of land under a verbal contract, when delivered to the vendee, is sufficient performance to take the case out of the statute of frauds, without the additional circumstances of payment of consideration, or the making of valuable improvements."

See, also, *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; and *Sutherland v. Tainer*, 17 Okla. 427, 87 Pac. 900.

Defendant had gone into possession, paid the purchase price, and performed on its part every obligation of the contract of assignment, except the covenant of the original lease to pay rents, part of which, however, it had paid.

It follows from the foregoing views that plaintiff was entitled to recover, and the judgment of the trial court should be affirmed.

After the first hearing in this cause, this court prepared and filed an opinion, affirming the judgment of the trial court upon a question of practice; but, after a rehearing upon a petition therefor, it appears to the court that the question considered in the first opinion was not presented by the briefs of plaintiff in error sufficiently in compliance with the rules of the court so as to entitle it to consideration; and, without at this time determining whether we were correct in our conclusion on the question then decided, we have considered the case upon its merits, and on a theory upon which it was presented to the trial court. The trial court appears to have held the defendant liable, because the assignment to it by the Capital City Business College of all of its assets effectually worked a dissolution of the latter corporation. We entertain some doubts whether, under the facts found by the court, and under the facts which the evidence in the record in any way tends to support, liability of defendant can be sustained upon this theory; but the theory upon which we have sustained the judgment of the trial court was one of the theories presented by the pleadings, and upon which the case

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was tried; and, if the trial court gave a wrong reason for the judgment rendered, such fact constitutes no ground for reversal.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; DUNN, J., absent, and not participating.

INTERNATIONAL BANK OF BRISTOW v. BOWSER.

No. 773. Opinion Filed July 23, 1912.

(125 Pac. 458.)

REPLEVIN—Proceedings—Issues and Proof. An intervener in an action of replevin, in his plea of intervention, alleged that he had, by virtue of a certain chattel mortgage, a special ownership in the property replevied, and prayed judgment for possession thereof. At the trial all the evidence introduced by him, which was admitted over the objection of plaintiff, was to establish that he was the absolute owner of the property in controversy. **Held,** that the admission of such evidence, under the issues as formed by the pleadings, was error.

(Syllabus by the Court.)

Error from Okmulgee County Court;
M. M. Alexander, Judge.

Action by the International Bank of Bristow against Council Long and another, and Henry Bowser intervenes. Judgment for intervener, and plaintiff brings error. Reversed and remanded.

Wm. L. Cheatham, for plaintiff in error.

Eaton, Beidleman & Carter, for defendant in error.

HAYES, J. This is an action in replevin commenced by plaintiff in error in the court below, hereinafter called plaintiff, to recover possession of two mules, in which plaintiff alleges a special ownership by virtue of a chattel mortgage executed by and delivered to it by one A. A. White. The action was originally against Council Long and one Kennedy. After the writ of

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replevin had been issued and had been served, and the property delivered to plaintiff, defendant in error filed a plea of intervention, in which he alleges a special ownership in the property and right to possession thereof by virtue of a certain mortgage, executed by said A. A. White to the First National Bank of Beggs, which defendant in error alleges has been assigned to him. Upon the trial of the cause to a jury, verdict and judgment was rendered in favor of defendant in error.

At the trial, over the objection of plaintiff, defendant in error, the intervener, was permitted to introduce evidence tending to show that he was the absolute owner of the property in controversy, and that he had purchased the property from said A. A. White; and instructions were given by the court upon this evidence to the effect that, if the jury found that, in consideration of the payment of the debt of A. A. White to the First National Bank of Beggs by the intervener, it was agreed that the property involved should become the property of the intervener, then the verdict should be for the intervener. The admission of said evidence and the giving of said instructions constitute the grounds of some of the errors assigned for reversal of the cause.

The rule stated in 34 Cyc. p. 1497, is:

"Either plaintiff or defendant may introduce evidence tending to show any property interest from which a right to possession arises, when they have alleged ownership generally without specifying the source of title or have denied the adverse party's right to possession; but, where they have alleged a particular interest in the property, the evidence admissible in their behalf must be confined to that which tends to establish the interest alleged."

In *McMillan Hdw. Co. v. Ross*, 24 Okla. 696, 104 Pac. 343, it was held that, when the petition in a replevin suit alleges that the plaintiff is entitled to possession of certain personal property by reason of a special interest therein, evidenced by a certain note and a chattel mortgage, but the proof shows that he is entitled to possession thereof, if at all, by reason of a certain other agreement with the defendant, and timely objection is made to

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such variance between the pleadings and the proof, it is fatal to the recovery of plaintiff.

Evidence of general ownership of the property in controversy by intervener was not an issue made by the pleadings in this case; and evidence offered to establish such issue was therefore inadmissible, and the objections thereto, which were timely made, should have been sustained.

Other assignments of error are set out in plaintiff's brief, some of which may have merit; but there has not been sufficient compliance with rule 25 of this court (20 Okla. xii, 95 Pac. viii) to entitle him to a consideration of same. This rule requires that the brief shall not only contain the specifications of error complained of, separately set forth and numbered, but that the argument and authorities in support of each point relied upon shall also be set out in the brief. The immense amount of business before this court demanding early attention makes this a salutary rule, and the enforcement of it necessary; for, if the court must be delayed to look up the authorities or brief the propositions suggested by counsel, even though the propositions be familiar ones, a great amount of time will necessarily be consumed by the court in doing the work that should be done by counsel, and the dispatch of business before the court greatly retarded.

For errors pointed out, the judgment of the trial court is reversed, and the cause remanded.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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BANK OF FAIRVIEW v. MARTIN *et ux.*

No. 1757. Opinion Filed July 23, 1912.

(125 Pac. 724.)

1. **APPEAL AND ERROR—Review—Questions of Fact.** Where there is evidence reasonably tending to support the verdict of the jury and the judgment entered thereon, the same will not be disturbed on appeal.

2. **SAME—Harmless Error.** The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

(Syllabus by the Court.)

Error from Major County Court;
O. M. Evans, Judge.

Action by the Bank of Fairview against B. F. Martin and another. Judgment for defendants, and plaintiff brings error. Affirmed.

D. H. Denman, Tom E. Willis, and *John V. Roberts,* for plaintiff in error.

S. B. Oberlender, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, to recover damages for the conversion of certain live stock upon which the plaintiff held a chattel mortgage. Upon trial there was a verdict for the defendants, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

One of the questions submitted to the jury is covered by an instruction to the effect that the burden of proof is upon the defendants to establish by a preponderance of the evidence that the cattle which the defendants got from Mrs. Leach (the mortgagor) are the same cattle which the plaintiff had a prior mort-

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gage on. This instruction covers the principal question of fact presented to the jury, and as they resolved it in favor of the defendants, and there is evidence reasonably tending to support their finding, this court is not at liberty to disturb the judgment of the court below upon the merits.

We have examined the brief of counsel for plaintiff in error and the record with considerable care, and are satisfied that they present no contention that would authorize a reversal.

Section 5680, Comp. Laws 1909, provides:

"The court, at every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The judgment of the court below must therefore be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

CONSOLIDATED SCHOOL DIST. No. 1, ALFALFA COUNTY, v. SCHOOL DIST. No. 24, ALFALFA COUNTY.

No. 1863. Opinion Filed July 23, 1912.

(125 Pac. 729.)

SCHOOLS AND SCHOOL DISTRICTS—Alterations—Apportionment of Liability. Where part of the territory of one school district is annexed to another, unless some provision is made by law respecting the property and existing liabilities, the property within the detached territory belongs to the municipality to which it is attached; and each is responsible for the debts contracted by it prior to the change.

(Syllabus by the Court.)

Error from Alfalfa County Court; F. M. Gustin, Judge.

Action by School District No. 24, Alfalfa County, against Consolidated School District No. 1, Alfalfa County. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

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Titus & Carpenter, for plaintiff in error.

A. C. Beeman, for defendant in error.

KANE, J. This was an action, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover a certain sum alleged to be due the plaintiff from the defendant, according to a certain apportionment made by the county superintendent. Upon trial to the court, there was judgment for the plaintiff, to reverse which this proceeding in error was commenced.

The case was tried upon an agreed statement of facts, in effect, as follows: Prior to the 5th day of August, 1907, school districts Nos. 110 and 92 were regularly organized school districts situated in Woods county, Okla. On that day the county superintendent detached a portion of the territory of district No. 110 and attached it to school district No. 92. After statehood all the territory comprising the two districts became a part of Alfalfa county; whereupon the county superintendent of Alfalfa county renumbered the districts, changing No. 110 to No. 25 and No. 92 to 24. Afterward the defendant, consolidated school district No. 1, was formed from the territory comprising school districts Nos. 25 and 12. At the time the territory was detached from district No. 110 and added to district No. 92, there was no attempt to adjust the assets and liabilities of the two districts to conform to the changed conditions; but after the creation of the consolidated school district No. 1 the county superintendent made such an adjustment, and found that there was due district No. 92 from district No. 110 the sum of $63.40; and that "the school board of consolidated school district No. 1 should issue a warrant to treasurer of school district No. 24 for $63.40 in full account to settle net indebtedness of consolidated district No. 1 to school district No. 24." The consolidated school district refused to comply with the findings of the county superintendent; whereupon this action ensued, and the trial court seems to have taken the same view as the county superintendent.

The county superintendent, and, no doubt, the trial court, proceeded upon the theory that section 8049, Comp. Laws 1909,

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authorized an adjustment by the county superintendent in cases like this. With this conclusion, we cannot agree. That section provides that:

"* * * When a new district is formed in whole or in part from one or more districts possessing a schoolhouse or entitled to other property, the county superintendent, at the time of forming such new district, shall equitably determine the proportion of the present value of schoolhouse or other property justly due to said new district. Such proportion when ascertained shall be levied by the district board of the district retaining the schoolhouse or other property upon the taxable property of the district, and shall be collected in the same manner as if the same had been authorized by a vote of the district for building a schoolhouse, and when collected shall be paid to the treasurer of the new district, to be applied towards procuring a schoolhouse for such district."

It is obvious that that section has no application to the situation presented by the facts in this case. In the instant case there was no creation of a new district, but simply a transfer of part of the territory of one district to another. This is authorized by section 7975, Comp. Laws 1909. We find no provision of law for the adjustment of the assets and liabilities occasioned by such a change in the boundaries of a district by the county superintendent, or any other person, board, or court. After detaching the territory from one district and adding it to another, the two municipalities retained their legal status, as though no change had taken place. The rule seems to be that, where part of the territory of one school district is annexed to another, unless some provision is made by law respecting the property and existing liabilities, the property within the detached territory belongs to the municipality to which it is attached; and each is responsible for the debts contracted by it prior to the change. *Winslow v. France, Treas.*, 20 Okla. 303, 94 Pac. 689; *Laramie County v. Albany County et al.*, 92 U. S. 307, 23 L. Ed. 552; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Wade et al. v. City of Richmond*, 59 Va. 583; *Higginbotham's Ex'rs v. Commonwealth*, 66 Va. 627; *Watson et al. v. Commissioners of Pamlico*, 82 N. C. 17.

In *Winslow v. France, supra*, Mr. Chief Justice Williams, in discussing this proposition in its application to counties, says:

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"If a portion of a territory is annexed to another county, unless some provision is made in the act respecting the property and existing liabilities of the old county, the territory or inhabitants detached from the original county lose all claim to share in the property belonging to the county from which it was taken. Whilst it is thus relieved from the indebtedness resting upon the latter, yet it incurs the liabilities and shares in the property of the county to which it is attached, and is equally subject to assessment and taxation for that purpose."

It follows that the judgment of the court below must be reversed and the cause remanded, with directions to dismiss the same, at the costs of the plaintiff.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

EVANS *et al.* v. BROWN *et ux.*

No. 1874. Opinion Filed July 23, 1912.

(125 Pac. 469.)

1. **BROKERS—Authority—Acting for Both Parties.** A sale of real estate from which a substantial advantage has been derived cannot be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser, unless it appears that the principal after full knowledge of all the facts confirmed the acts of the agent.

2. **SAME — Unauthorized Acts — Ratification—Evidence.** Evidence examined, and held sufficient to support the finding of the court below as to the scope of the agency, and that there was no confirmation by the principal after full knowledge of all the facts.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by W. F. Evans against C. S. Brown and wife. By cross-petition the St. Louis and San Francisco Railroad Company was made party defendant. Judgment for Brown and wife, and plaintiff and the railroad company bring error. Affirmed.

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W. F. Evans, R. A. Kleinschmidt, and *J. H. Grant,* for plaintiffs in error.

Burwell, Crockett & Johnson, for defendants in error.

KANE, J: This was a suit commenced by L. F. Parker, and afterward revived in the name of W. F. Evans, the plaintiff in error, against the defendants in error, to reform a deed to a certain piece of real estate. The parties hereafter will be designated plaintiffs and defendants as they were designated in the court below. By way of answer and cross-petition the defendant C. S. Brown set up fraud on the part of his agent who negotiated the sale of the realty out of which the controversy arose, and prayed that the deed sought to be reformed be canceled and his title to the land cleared. Upon trial to the court a decree was entered in conformity with the prayer of the defendant, to reverse which this proceeding in error was commenced.

The court below made general findings in favor of the defendants, and therefore every allegation of their cross-petition which is reasonably supported by the evidence must be resolved in their favor. The defendants C. S. Brown and Margaret Brown were husband and wife; the husband being the owner in fee simple of the lot involved. Some time prior to the execution of the deed sought to be canceled, Brown and one Poole, the local agent of the St. Louis & San Francisco Railroad Company, in Oklahoma City, had entered into an oral agreement, whereby Poole was to secure a purchaser for the land, for which service Brown was to pay the usual commission. Brown was unfamiliar with the value of properties in Oklahoma City, and in settling upon a price for the land he suggested to Poole that the land was worth $5,000, whereupon Poole said that in his judgment it was not worth over $4,000, and recommended that Brown take that amount for it, which proposition Brown finally accepted. Some four or five months before the execution of the deed, but subsequent to the agency of Poole, the general right of way agent for the St. Louis & San Francisco Railroad Company, upon the suggestion of Poole, advised his company to purchase the land for depot and terminal purposes. Several days prior to the contract of sale, Mr. Gray,

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vice president of the company, instructed Mr. Poole, its local agent, and the agent of Brown for the purpose of negotiating the sale, to purchase the land for the railroad company, to be used for terminal and depot facilities. Shortly after the instructions of the vice president, the right of way agent appeared in Oklahoma City, and had a conversation with Mr. Poole in relation to the purchase of the land. At this conference Poole and Williams, the right of way agent, agreed that they would tell Brown they wanted the property for a broom corn warehouse. Poole then telephoned Brown that the man who wanted to purchase his property for a broom corn warehouse was in town. Brown inquired where he could meet the prospective purchaser and talk with him. Poole answered that it would not do for Brown to see the purchaser, because he might "queer the whole deal," that he (Poole) would arrange a meeting at the Indiahoma Club at, or a little after, noon of that day. Pursuant to this arrangement, Brown and the right of way agent were introduced by Poole, whereupon Brown asked the right of way agent what his business was, who answered that "he had no particular business now; that he was a retired capitalist." Brown then asked him what he desired this property for, and he said he wished to acquire it for the purpose of building a broom corn warehouse upon it. They (Brown, Poole and the right of way agent) discussed the price and other details of the trade, and Brown agreed to take $4,000, whereupon the right of way agent then suggested that they go to the office of his attorneys for the purpose of having the necessary papers prepared. On the way to the office of the attorneys, who, it transpires, were also the attorneys of the railway company, Brown again asked Williams what he wanted this property for, and was again assured that he wanted it for the purpose of building a broom corn warehouse thereon. When they reached the attorneys' office, Brown was left sitting in the reception room, and Poole and the right of way agent retired to one of the private offices, and after consulting with a member of the firm, came out with a contract drawn, prepared for signature, wherein it was agreed that Brown should sell the property to one Enderline, who was at that time

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a clerk in the attorney's office. Poole had with him cash belonging to the railroad to the amount of $200, which money was paid to Brown. A draft was drawn by Williams as the general right of way agent for the St. Louis & San Francisco Railroad Company, and handed to Brown with the request that he indorse the same, which he did, taking it, according to his testimony, to be simply a receipt for the money paid at that time. While they were in the attorney's office, and before the money was paid, Brown again asked Williams what he wanted this property for, and insisted that he desired to know absolutely what the property was to be used for, and was again assured that the property was going to be used for the purpose of building a broom corn warehouse thereon. Poole was present during this conference and confirmed all the right of way agent said pertaining to the purpose for which the property was being purchased. Several days after this Poole telephoned Brown that he had the draft to pay the balance of the purchase price, whereupon Brown went to a bank designated by Poole for the purpose of closing the deal, where the deed was delivered to Poole by Brown, who executed the deed and laid it down on the desk. Poole delivered to Brown a voucher issued by the St. Louis & San Francisco Railroad Company with a draft for $3,800. Poole's version of what took place at that meeting is hereinafter set out in full. The deed executed by Brown and delivered to Poole conveyed the property to L. F. Parker, who at that time was at the head of the legal department of the railroad company. Subsequently Parker died, and W. F. Evans, his successor, caused the suit to be revived in his name.

The evidence also tends to show that at the time of the sale of the land its reasonable value was in the neighborhood of $10,000.

The cross-petition of the defendants substantially set up the foregoing facts. Originally the railroad company filed a disclaimer and afterwards admitted that it was the real purchaser of the land, and that it was being held for its use and benefit by Mr. Evans, its general counsel.

Counsel for plaintiffs in error present their contentions under three subheads, as follows:

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"(1) The alleged false representations complained of, and which were to the effect that the property was being purchased for a broom corn warehouse, and that Williams was a capitalist, and the purchaser, were not material. (2) Poole's employment did not constitute him anything more than a mere middleman, whose duty it was to find a purchaser. He was not clothed with any discretion in the premises, and his employment by plaintiffs herein was not fraudulent or against public policy. (3) Conceding, for the purposes of this argument, that everything defendants have alleged is true, still they are not entitled to the relief prayed for by them. Having discovered the alleged fraud while the contract was still executory, and having voluntarily elected to complete it, they thereby waived the alleged fraud and are estopped from setting it up in impeachment of said contract."

A mere statement of what the court considers the established facts practically disposes of the first two assignments of error. No principle is better settled than that a man cannot be the agent of both the seller and the buyer in the same transaction, without the intelligent consent of both. Loyalty to his trust is the most important duty which the agent owes to his principal. Reliance upon his integrity, fidelity, and ability is the main consideration in the selection of agents; and so careful is the law in guarding this fiduciary relation that it will not allow an agent to act for himself and his principal, nor to act for two principals on opposite sides in the same transaction. In such cases the amount of consideration, the absence of undue advantage, and other like features are wholly immaterial. Nothing will defeat the principal's right of remedy, except his own confirmation, after full knowledge of all the facts. Actual injury is not the principle upon which the law holds such transactions voidable. The chief object of the principle is not to compel restitution where actual fraud has been committed, or unjust advantage gained, but it is to prevent the agent from putting himself in a position in which to be honest must be a strain on him, and to elevate him to a position where he cannot be tempted to betray his principal. *Hunter Realty Co. et al. v. Spencer et al.*, 21 Okla. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622; *Ferguson v. Gooch*, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; *Conkey v. Bond*, 36 N. Y. 427; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541; *Henderson et al. v. Vin-*

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cent, 84 Ala. 99, 4 South. 180. In *Hunter Realty Co. et al. v. Spencer et al., supra,* a case similar in principle to the one at bar, it was held:

"Where an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is contrary to public policy, and voidable in equity upon the application of either party."

So well settled is the foregoing principle that its soundness is not controverted by counsel for plaintiffs in error. But they contend that the case at bar falls within an exception to the general rule equally well established by the authorities, to the effect that the maxim that "no man shall serve two masters" does not prevent the same person from acting as agent for certain purposes for two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other. *Nolte v. Hulbert,* 37 Ohio St. 445. A great many cases are cited in support of the exception. Another test for determining whether a case falls within the general rule or the exception is quoted from *Southack v. Lane,* 23 Misc. Rep. 517, 52 N. Y. Supp. 688, as applicable to the facts in the case at bar:

"Where he (the agent) acts simply as a middleman to bring the parties together, and takes no part whatever in the negotiations, there will be nothing illegal in his acting for both parties, and claiming remuneration from each."

None of the foregoing tests applies to the case at bar. In the first place, the evidence tends to prove that the defendant relied upon the judgment of Poole in fixing the price of the lot, and was influenced by his suggestions on that point at the time the contract of agency was entered into and all through the following negotiations. The defendant told Poole that he thought the land was worth $5,000, which, the evidence discloses, was about one-half its value; but Poole insisted that the land was only worth $4,000, which value the defendant finally adopted. On this question the defendant testified:

"I finally made a price of $4,000; told him to get over $4,000 if he could, and left it with him."

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It is difficult to harmonize this conduct on the part of Poole with loyalty to Brown. Poole undoubtedly knew that the land was worth a great deal more than the price he induced Brown to place upon it. Contrast his conduct with S. H. Brown, another owner of property adjoining the lot in controversy and to whom he owed no duty, and his conduct with his principal, the defendant in this case. The day before the meeting of Brown, Poole, and the right of way agent, at which the contract of sale was executed, Poole had a conversation with Mr. S. H. Brown pertaining to the purchase of the property by the railway company, concerning which Mr. S. H. Brown testified:

"He (Poole) says: 'I have known you quite a while, and believe you to be a business man, and you will not impose on us, and I will tell you frankly what we want. We want to buy that property of yours, that storage property in block B.' He says, 'I haven't been so frank with anybody along the line, and I ask you to keep this to yourself,' and then he gave me a little outline of their plans. He wanted to purchase this line of property for the purpose of putting in a depot. The purpose was to come in the block west of us, which would be block C. I said: 'By the way, I know the owner of that property, Mr. Brown, and, if I can be of any service to you, I would be glad to.' He says: 'No, I know him too. The property is listed with me. You don't need to trouble about it.' He says: 'We can get that at a very reasonable price, putting it up to Brown that we are going to put a broom corn warehouse on the property.'"

The evidence further shows that S. H. Brown received $20,000 for his property, $2,000 of which was allowed for the buildings thereon. In the face of such evidence, we do not see how it can be said with any show of reason that the interests of the defendant and the railway company were not in conflict, or that the loyalty of Poole to the railway company did not constitute a grave breach of duty to the defendant. Thus it appears that the first test invoked by counsel for plaintiffs in error fails.

The second one seems to us equally as inapplicable. It seems that, instead of taking "no part whatever in the negotiations," Poole took a very active part therein. The evidence shows that, when the right of way agent arrived to close up the deal,

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Poole telephoned to defendant of his arrival and warned defendant not to see him alone, "because he might queer the deal." And the evidence further tends to show that Poole was present at all conferences between the right of way agent and the defendant, and actively participated in deceiving the defendant as to the facts. Instead of forwarding the negotiations between Brown and the railway company in the interest of his principal, he forwarded them in the interest of the railway company. He was bound to disclose to his principal all facts open to his knowledge material to the matter in which he was employed. He not only concealed material facts, but by direct false statements did everything in his power to mislead and deceive the defendant. Paraphrasing a sentence from *Young v. Hughes et al.*, 32 N. J. Eq. 372, a case resembling this in a great many particulars, it is impossible to read the testimony without concluding that the skill and experience of Poole were not exerted for, but rather against, his principal. It is well settled that no sale from which a substantial advantage has been derived can be sustained when he who actively promoted it, acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser. *Donovan v. Campion et al.*, 85 Fed. 71, 29 C. C. A. 30.

On the next proposition there is considerable evidence tending to support the contention of counsel for plaintiffs in error, but there is also evidence reasonably tending to support the findings of the court thereon. That being so, this court is not called upon to weigh the evidence. It is unnecessary to notice in detail the evidence on this point. It is clear that up to the time the deed was delivered the defendant was deceived as to the true condition of affairs by the false statements of one whom he had a right to believe. After the deed was delivered, the defendant evidently became suspicious that something was wrong, but that he confirmed what had been done after full knowledge of all the facts is not at all apparent. As to what transpired at the time the deed was delivered, Mr. Poole testified:

"As I remember, I laid the voucher and draft out on the counter. He laid the deed down also. We stood there and talked a minute or two, and Mr. Brown signed the voucher, and

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I witnessed it right there, L. T. Poole. I took up the deed, Mr. Brown took up the draft for $3,800, and Mr. Brown said the property was too cheap; he had been stung."

It is upon the fact that the consideration was paid with drafts of the railway company, and the statement by Brown that he had been stung, that counsel principally base their contention that the defendant elected to waive the alleged fraud after discovering the same, and is therefore estopped from setting it up in impeachment of the deed. We cannot agree with counsel. While it may be true that defendant discovered facts which made him suspicious of the good faith of his agent, there is nothing to show that he had possession of sufficient facts to enable him to determine just how and by whom he had been deceived and what his rights in the premises were. The railway company was at all times denying that it had any interest in the land, and a year and six months after the commencement of the proceedings, and some considerable time after the defendant filed his answer and cross-petition, it solemnly "disclaims any interest in this suit and denies that it is the proper party defendant in this cause." It is apparent that at that time the officers and the legal department of the railway company were of the opinion that what had transpired tending to inform the defendant of the true situation was not sufficient to establish its connection with the transaction. On the whole, we are of the opinion that there is evidence reasonably tending to show that the defendant, in due time after the discovery of the fraud practiced upon him, sought the relief to which he was entitled, and did not by delay and vacillation waive his right to a rescission of the sale and a cancellation of the deed upon the ground of the fraud of his agent.

The judgment of the court below must therefore be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

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FERGUSON v. McKEE.

No. 1879. Opinion Filed July 23, 1912.

(125 Pac. 458.)

APPEARANCE—Redelivery Bond—Effect. Where property has been taken under replevin, and defendant executes a redelivery bond, conditioned to return the property and pay costs and damages that may be awarded, and the sheriff returns the property to the defendant, the giving of such bond is an appearance in the action and a waiver of any defect in the summons.

(Syllabus by the Court.)

Error from District Court, Adair County; John H. Pitchford, Judge.

Action by A. C. McKee against George Ferguson. Judgment for plaintiff, and defendant brings error. Affirmed.

Nance & Priest and *Wm. Cravens,* for plaintiff in error.

E. B. Arnold, for defendant in error.

HAYES, J. This is an action of replevin begun in the district court of Adair county, by defendant in error against plaintiff in error for the recovery of certain personal property, and for damages for unlawful detention thereof. The action was begun in that court by defendant in error filing therein his petition, affidavit for replevin, and the bond, as required by law. Whereupon the clerk of the court issued an order of delivery and a summons to plaintiff in error. The order of delivery and summons were duly served on the 3d day of February, 1910. On the same day plaintiff in error executed a redelivery bond, which was duly approved by the sheriff, and the property described in the redelivery bond was returned to plaintiff in error. The cause was thereafter set down for trial on one of the days of the next regular term of said court; but plaintiff in error failed to file any answer or other pleading, and judgment by default was rendered. Thereafter he filed a motion to vacate the

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judgment, because the service of summons had upon him was void, by reason of certain defects in the summons, which motion was by the court overruled.

It is sought to reverse the judgment of the trial court here upon the ground that it was without jurisdiction on account of the defective service; but, if it be conceded that the summons was so defective as to render the service void, still the trial court had jurisdiction to render judgment by default, for the execution by plaintiff in error of the redelivery bond, conditioned as the statute requires, constituted an entry of general appearance in the action and a waiver of any defects in the summons. *Fowler v. Fowler,* 15 Okla. 529, 82 Pac. 923.

It follows, therefore, that the judgment of the trial court should be affirmed; and it is so ordered.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

DIAMOND v. SHAW.

No. 1888. Opinion Filed July 23, 1912.

(125 Pac. 726.)

APPEAL AND ERROR—Review—Ruling on Motion for New Trial. An order sustaining a motion for a new trial will not be reversed by the Supreme Court, unless it can be seen beyond a reasonable doubt that the trial court has manifestly erred as to an unmixed question of law.

(Syllabus by the Court.)

Error from Grant County Court;
Emery H. Breeden, Special Judge.

Action between August Diamond and Clinton Shaw. From the judgment, Diamond brings error. Affirmed.

J. B. Drennan, for plaintiff in error.

A. C. Glenn and *Mackey & Stephenson,* for defendant in error.

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KANE, J. This is an appeal from an order sustaining a motion for a new trial. The motion for new trial contains all the statutory grounds upon which a new trial may be granted. There is nothing to indicate upon which ground the motion was sustained. Counsel for plaintiff in error, in his brief, says that the second, third, and sixth reasons are not sworn to, as provided by the statutes of the state of Oklahoma, and then takes up the fifth ground for new trial, "The verdict of the jury was not sustained by sufficient evidence, and is contrary to law," and contends that the motion should not have been granted on that ground. We may grant all this; but, as was said by Mr. Chief Justice Brewer, in *Ryan v. Topeka Bridge Company*, 7 Kan. 208:

"There may have been abundant reason in those other grounds for setting aside the verdict, and, for aught that appears in the record, the court acted on those grounds. Even if we should examine the question presented by counsel and find error, we would still be unable to say that such erroneous ruling was the ground of disturbing the verdict."

Moreover, an order sustaining a motion for a new trial will not be reversed by the Supreme Court, unless it can be seen beyond a reasonable doubt that the trial court has manifestly erred as to an unmixed question of law. *Nat. Refrigerator & Butchers' Supply Co. v. Elsing*, 29 Okla. 334, 116 Pac. 790.

From what has been said, it is obvious that the case at bar does not fall within that rule. The judgment of the court below must therefore be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

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HENDERSON-STURGES PIANO CO. v. SMITH, *Sheriff.*

No. 1898. Opinion Filed July 23, 1912.

(125 Pac. 454.)

SHERIFFS AND CONSTABLES—Liability—Amercement. Section 5997, Comp. Laws 1909, which provides for the amercement of sheriffs, is imperative in its terms, and grants no discretion to the court. When a sheriff fails to make return of a writ of execution as required by statute, it is the duty of the court to amerce him, whether his omission results from willful wrong or mere neglect, and whether such omission has resulted in actual injury or not.

(Syllabus by the Court.)

Error from District Court, Pontotoc County; A. T. West, Judge.

Motion by the Henderson-Sturges Piano Company to amerce T. J. Smith, Sheriff of Pontotoc County, for failure to make due return of an execution. From an order denying the motion, the piano company brings error. Reversed, with directions.

Thomas P. Holt, for plaintiff in error.

HAYES, J. On the 24th day of June, 1909, plaintiff in error obtained a judgment in the district court of Pontotoc county, in an action then pending in said court, entitled Henderson-Sturges Piano Company v. L. W. Simpson and J. W. Bolen. A motion to vacate said judgment was thereafter filed by defendants, which was overruled by the court. In the interim an execution had been issued, directed to defendant in error as sheriff of said county, which execution was returned, "Nothing done." On November 18, 1909, an alias execution was issued, directed to defendant in error, commanding him to take such goods and chattels of the said debtors as necessary to pay the sum specified in said judgment and 6 per cent. interest from the date of the rendition of the judgment, and further commanding defendant in error to make due return of said writ into court within sixty days, as required by law. Defendant in error failed

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to execute said writ and return same into court within said sixty days from date thereof. Fifty-eight days after the return day of said writ, the same was returned into court; but prior thereto, on the 3d day of March, 1910, plaintiff in error began this action in the court below by filing his motion to amerce defendant in error for the amount of said judgment, with 10 per cent. additional for failure to make due return of said execution within sixty days, as required by statute. Notice of this motion, as required by statute, was served upon defendant in error. Defendant filed no answer; and, so far as the record discloses, made no defense to the proceeding. Thereafter, on the 26th day of March, 1910, the court overruled said motion to amerce, and rendered judgment in favor of defendant in error. It is from the action of the court in overruling said motion of amercement that this appeal is prosecuted.

Section 5994, Comp. Laws 1909, makes it the duty of the sheriff or other officer to whom a writ of execution has been issued to return such writ into court within sixty days from the date of the issuance of same.

Section 5997, *Id.*, provides in part as follows:

"If any sheriff or other officer * * * shall neglect to return any writ of execution to the proper court on or before the return day thereof, * * * such sheriff or other officer shall on motion in court and two days' notice thereof, in writing, be amerced in the amount of said debt, damages, and costs, with ten per cent. thereon to and for the use of said plaintiff or defendant, as the case may be."

The foregoing statutes were adopted from the state of Kansas into this jurisdiction. In *Bond v. Weber,* 17 Kan. 410, they were construed by the Supreme Court of that state as follows:

"If we give to this language [referring to the language of the above statute] its ordinary meaning, there can be but one conclusion. It is not that he *may* be amerced, but that he *shall* be. The duty of returning the execution within 60 days is expressly cast upon him; and a failure to perform that duty as expressly subjects him to amercement. The terms of the statute imply no discretion. The command is positive and peremptory. The amercement is not in compensation, and to be

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measured by the extent of the injury, but a penalty for neglect of duty, and of definite and fixed amount."

See, also, *Smith v. Martin,* 20 Kan. 572.

The sheriff, by failure to return said execution within the time required by law, brought himself clearly within the terms of the statute, and subjected himself to be amerced therefor. *Duncan v. Drakely,* 10 Ohio, 46; *Moore v. McClief,* 16 Ohio St. 50.

No brief has been filed in this court by defendant in error; and under numerous decisions of this court, among which are the following: *Sharpleigh Hdw. Co. v. Pritchard,* 25 Okla. 808, 108 Pac. 360; *School District No. 39, Pottawatomie County v. Shelton,* 26 Okla. 229, 109 Pac. 67, 138 Am. St. Rep. 962; *Butler v. Stinson,* 26 Okla. 216, 108 Pac. 1103; *Butler v. McSpadden,* 25 Okla. 465, 107 Pac. 170; *Ellis v. Outler,* 25 Okla. 469, 106 Pac. 957—the court is not required to search the record to see if there is any theory upon which the judgment of the trial court can be sustained; but, since the statute here involved is of a penal character, and great strictness is required of one who seeks to avail himself of the remedy it affords, we have carefully examined the record to ascertain if it presents any theory upon which the judgment can be sustained, but have been unable to find any.

The judgment of the trial court is reversed, with direction to proceed in accordance with this opinion.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; DUNN, J., absent, and not participating.

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SNIDER v. PERKINS *et al.*

No. 1902. Opinion Filed July 23, 1912.

(125 Pac. 448.)

APPEAL AND ERROR—Review—Burden of Showing Error. In the Supreme Court error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed.

(Syllabus by the Court.)

Error from Bryan County Court;
Chas. A. Phillips, Judge.

Action by T. J. Perkins and another against F. M. Snider. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cruce, Cruce & Bleakmore, for plaintiff in error.

C. C. Hatchett, for defendants in error.

KANE, J. This was an action for damages for the conversion of a box house situated on a certain tract of land in Bryan county, commenced by the defendants in error, plaintiffs below, against the plaintiff in error, defendant below, in the county court. On trial there was a verdict for the plaintiffs, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

Counsel for plaintiff in error say in their brief:

"In the discussion of this case, we cannot see where any authorities can be cited to assist this court in any way in the solution of the controversy between the parties hereto. The plaintiff in error is relying upon all the assignments of error filed herein. At the same time the particular questions involved are: First, as to whether or not the county court of Bryan county had jurisdiction to try this case, and, if it did, whether or not the court erred in excluding from the jury certain testimony offered upon the part of the defendant below, and, if not, whether or not the court erred in taking from the jury, by its charge, what testimony there was introduced. All of these questions must be decided by the court for itself. We can think of no authorities that would assist this court."

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The court can think of no authorities which support the contentions of counsel; and, as it is not apparent that any of them are well taken, we will indulge the presumption that the judgment of the court below is correct, and affirm the same. In the Supreme Court error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed. *Seaver v. Rulison*, 29 Okla. 128, 116 Pac. 802. It is so ordered.

TURNER, C. J., and HAYES, J., concur; WILLIAMS, J., disqualified, and DUNN, J., absent, and not participating.

RICHARDSON *et al.* v. PARKER, McCONNELL & CO.

No. 1911. Opinion Filed July 23, 1912.

(125 Pac. 442.)

FRAUDS, STATUTE OF—Promises to Answer for Debt of Another—Original or Collateral Promise—Question for Jury. Where a party verbally promises to pay for advancements to be made to another, if the verbal contract primarily creates a liability on the part of the promisor, the same is not within the statute of frauds.

(a) If the intention, however, of the promisor was that he should only be collaterally liable, and pay only in case of default on the part of the party to whom the advancement was actually made, then such verbal contract would be void as within the prohibition of the statute of frauds.

(b) **Held**, under the facts in this case, that the question as to whether the verbal undertaking was primary or collateral was a question of fact to be determined by the jury under proper instructions.

(Syllabus by the Court.)

Error from Tillman County Court;
T. E. Campbell, Judge.

Action by Parker, McConnell & Co., against W. A. Richardson and another. Judgment for plaintiffs, and defendants bring error. Affirmed.

McGuire & Caudill and *L. P. Mosier*, for plaintiffs in error.

Mounts & Davis, for defendants in error.

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WILLIAMS, J. This proceeding in error seeks to review the judgment of the lower court in an action wherein the defendants in error, Parker, McConnell & Co., as plaintiffs, sued the plaintiffs in error, W. A. Richardson and P. P. Richardson, as defendants, on a certain itemized account, wherein it was alleged that the said defendants were indebted to plaintiffs in a certain sum "for goods, wares, and merchandise, viz., groceries, which plaintiffs sold and delivered to said defendant C. M. Richardson." The defendants answered by general denial. Trial was had, and judgment rendered in favor of the plaintiffs in the sum sued for, to wit, $279.15.

The contention in this case is that the goods, wares, and merchandise were sold to C. M. Richardson, and not to the plaintiffs in error; and therefore they are not liable, because they did not agree in writing to become bound therefor. Paragraph 2, sec. 1089, Comp. Laws 1909; section 847, St. Okla. T. 1890.

The evidence tended to show that W. A. Richardson stated, when talking with defendants in error:

"We will just let that go, but will pay [referring to the one in controversy] that account later on." C. M. Richardson was one of the sons of W. A. Richardson. The evidence also tended to show that said W. A. Richardson said "that was his son that had moved down here, and wanted me to let him have some groceries, and went on to say that whatever he got he would see that it was all right and paid for. He said that he would be out there farming with them, but what one got they were all good for, and impressed it upon my mind they would pay for it. He told me to keep the account separate, so that they would know what he got on the books from P. P. Richardson's account."

After C. M. Richardson moved away, the defendants in error sent him a note to sign, writing him as follows:

"Mr. C. M. Richardson, Okeene, Okla.

"Dear Sir: We are today sending First National Bank of Okeene a note for the amount of your account, with interest to date. We had a conversation with your father the other day, and he instructed us to do this and said you would sign note and return at once. Now, we hope you will attend to this at once and save us a trip up there. As this amount is so large we can-

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not afford to carry it in this shape any longer. We think, under the existing circumstances, that you will certainly sign this note without any trouble."

Later the defendants in error again wrote to the same party as follows:

"I have just seen your father and brother in regard to your account and they claim you have made no arrangements for them to settle your account, only that they would sign a note with you for the same. We are again sending to the First National Bank of Okeene note with interest to date shown thereon, which we hope you will go and sign as soon as you receive this letter. Your father and brother will sign as soon as you return with your signature."

The evidence further, on the part of the defendants in error, was as follows:

"The conversation was that occurred at the time when Mr. Richardson brought his son in there and introduced him, and told us he wanted to open up an account, and that they would be responsible, and that they would see that it was paid, if he didn't."

The evidence further, on the part of the plaintiffs, was that the plaintiffs in error stated to the defendants in error, before the goods were sold to C. M. Richardson, that they would pay for such goods.

In *May v. Roberts,* 28 Okla. 619, 115 Pac. 771, the syllabus is as follows:

"R. said to M., a physician, 'I want you to go to that little house (pointing same out). My tenant's wife, Mrs. B., is sick there; and I want you to look after her and take care of her.' M. asked him about the pay, and he said, 'I will see that it is paid.' It was in answer to M.'s question about pay for such service as he might render to Mrs. B. that he said, 'I will see that it is paid.' *Held,* that it was error to exclude this evidence from the jury.

"(a) Such evidence was competent and material for the consideration of the jury, in connection with all the facts and circumstances proved, to determine whether the liability created was primary or collateral.

"(b) If the liability was primary, such verbal contract was valid, and not within the statute of frauds.

"(c) If the intention was that the husband of Mrs. B. should be primarily liable, and that R.'s liability should be only

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collateral (that is, to answer in case of the husband's default), then the contract was void as within the statute of frauds."

In the case at bar, the cause was submitted to the jury by the court under instructions conformable to the rule announced in the above case.

The question was whether, under all the evidence, the credit was given jointly to C. M. Richardson with his father, W. A. Richardson, and P. P. Richardson, or to C. M. Richardson, with the understanding that, if he did not pay for said goods, wares, and merchandise, then the said father and brother would. If the former, the plaintiffs in error were liable; if the latter, the statute of frauds intervened and struck down the contract. Under the evidence in this case, it was a question of fact for the determination of the jury under proper instructions. The jury having found against the contention of the plaintiffs in error, and there being some substantial evidence to sustain such verdict, the same will not be disturbed on review in this court.

The judgment of the lower court will be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

CHEROKEE NAT. BANK v. UNION TRUST CO.

No. 1914. Opinion Filed July 23, 1912.

(125 Pac. 464.)

1. **BANKS AND BANKING—Forged Check—Payment—Rights of Bona Fide Holders.** Where a bank, in good faith and for value, purchases from an indorser a check upon another bank, and thereupon indorses and forwards the same to its collection agency for collection, and the same is presented by the collection agent to the drawee bank, and is paid by the drawee bank, the drawee bank, upon thereafter discovering the check to be a forgery, cannot, by reason of the negotiable instruments law (sections 4496 and 4622, Comp. Laws 1909), recover the money back from the bank to whom it was paid.

2. **SAME.** A drawee, who pays to a bona fide holder a check to which the drawer's name has been forged, cannot recover the amount of such payment.

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Opinion of the Court.

3. **GUARANTY—Construction of Contract—Indorsement of Check.** The guaranty of an indorsement on a check applies only to the indorser, and does not protect the drawee against the risk of cashing a check to which the maker's name is forged.

(Syllabus by the Court.)

Error from Craig County Court;
N. J. Gubser, Judge.

Action by the Cherokee National Bank against the Union Trust Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Seymour Riddle and *Biddison & Campbell,* for plaintiff in error.

Chas. J. Wrightsman and *Chas. E. Bush,* for defendant in error.

HAYES, J. Plaintiff in error was plaintiff in the court below, and defendant in error was defendant. Both parties are domestic corporations, engaged in the banking business in Craig county and Tulsa county, respectively. This proceeding in error is prosecuted from an order of the trial court, sustaining a demurrer to plaintiff's petition and dismissing its cause of action, and the sole question presented in this court for determination is whether plaintiff's petition states a cause of action.

It alleges, in substance, that on the 3d day of January, 1910, one C. Caldwell, who was a customer and depositor of the bank of plaintiff, presented to defendant, Union Trust Company, a check for the sum of $325, payable to the order of Oliver Smith, drawn on the plaintiff bank. At the time the check was presented to defendant and paid by it, the same was indorsed by Oliver Smith, the payee therein, J. W. Sanders, and J. E. Temples, for whom defendant cashed the check. Immediately after purchasing the check, defendant forwarded it for collection through its collection agency, the National Bank of Commerce of Kansas City, Mo., with the following indorsement thereon in writing:

"Pay Nat'l Bank of Commerce. Previous indorsements guaranteed. Kansas City, Mo. OK123, Jan. 14, 1910. Union Trust Company, Tulsa, Oklahoma."

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On the 15th day of the same month, the National Bank of Commerce received the check and forwarded it to its collection agent at Vinita. Its collection agent, upon receiving the check, presented the same to plaintiff and received payment thereon in full, which sum was duly remitted to and received by defendant in full payment of the check. Afterwards, on the 22d day of January, 1910, plaintiff discovered that the signature of the drawer upon said check was not the real signature of the pretended drawer, but was a forgery. Plaintiff immediately, upon said discovery, notified defendant bank that the check was a forgery, and demanded that defendant repay to plaintiff the money it had received on the check from plaintiff, which defendant refused to do. Plaintiff alleges that in paying the check it relied upon the indorsements of defendant as written upon said check, and relied upon and believed that all the indorsements upon the check, as they appeared thereon, were genuine and true indorsements. It thereupon prayed judgment in the amount of said check, being the sum of money paid thereon by plaintiff to defendant, and for costs.

The court, in *American Express Co. v. State National Bank*, 27 Okla. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188, held the circumstances under which a payee receiving money from a bank, purporting to be drawn upon it by one of its depositors, but the signature upon which was in fact forged, is entitled to retain the money to be as follows:

"First, that the payee was not negligent in receiving the check; second, that the payor was lacking in due care in paying the same; and, third, that upon the payor's action the payee has changed his position, or would be in a worse condition if the mistake was corrected than if the payor had refused to pay the check at the time of its presentment."

In that case the bank upon which the check was drawn paid the same upon its presentment to the bank by the payee, and thereafter discovered that the name of the purported drawer had been forged to the check. The check was signed in the manner that was customary for the drawer to sign its checks; but it was not shown that the payee, on account of the payment of the check when presented, had been put in a worse position than if pay-

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ment had been refused. This court affirmed a judgment of the trial court, holding that the bank was entitled to recover. The transaction involved in that case arose long before the adoption of the uniform negotiable instruments law, enacted in this state on the 20th day of March, 1909 (Sess. Laws 1909, p. 387); and this court, in departing from the old doctrine that a bank is bound to know its depositors' signatures, and cannot recover money paid upon the forgery of the drawer's name, when the forgery is discovered, and in adopting the rule announced therein as the one supported by the sounder reason, although not supported by the weight of authority, stated in the opinion that:

"The old rule has not become a part of our common law by general usage or custom; nor has it been expressly or impliedly made part of our law by statute."

It will serve no useful purpose to review, in this opinion, the authorities supporting the respective rules, and the reasons thereof; for the question before us now is: Has a drawee, who, without knowledge on its part of the forgery, has paid a check, a right to recover money paid on a depositor's forged check, in the absence of any negligence or fraud on the part of the holder to whom the check was paid?

Section 62 of the act of the Legislature, approved March 20, 1909 (Comp. Laws 1909, sec. 4496), provides:

"The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and, 2. The existence of the payee and his then capacity to indorse."

The uniform negotiable instruments law has been enacted in Missouri, and constitutes part of the statutes of that state. In *National Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719, 125 S. W. 513, the facts presented the question now under consideration, including the construction of the statute above quoted. In the opinion it was said:

"The adoption in this and other states of our negotiable instruments law was for the purpose of having in the statutory laws of the states a uniform law in regard to commercial paper. A confusion was known to exist on many of the everyday transactions concerning such paper, and it may be said that there was no

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question upon which the courts were more in conflict than upon the question involved in this case. After a careful examination of the new law, we are inclined to believe that it was intended to adopt the law as declared in *Price v. Neal, supra* (referring to *Price v. Neal,* 3 Burr, 1354)."

See also, *Nat. Bank of Commerce v. Mechanics' American Nat. Bank,* 148 Mo. App. 1, 127 S. W. 429.

In *Title Guaranty & Trust Co. v. Haven,* 126 App. Div. 802, 111 N. Y. Supp. 305, the Supreme Court of that state, in its First Appellate Division, construing the same statute, said:

"A bank which pays a check purporting to be drawn on it by one of its depositors guarantees the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and, where such signature is forged, cannot recover back the amount from the person to whom it was paid, although the position of the parties to such person has not changed in any respect."

This case was, on appeal, reversed by the Court of Appeals, and it was held that the foregoing statute did not apply in the case; but the construction of the statute was approved. *Title Guaranty & Trust Co. v. Haven,* 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131.

Referring to the negotiable instruments law, the Supreme Court of Oregon, in which state the law has also been enacted, in the recent case of *Lumberman's Nat. Bank of Portland v. Campbell,* 121 Pac. 427, said:

"The act from which these excerpts are taken was designed to harmonize the decisions of courts of last resort in respect to commercial paper, and to give to negotiable instruments a degree of certainty that would be universal in its application in the states enacting the law."

That the foregoing excerpt states the chief purpose of the negotiable instruments law is familiar knowledge to the courts and to the bar. Of course, it is fundamental that the court of no state in which the law is enacted is bound by the construction of the statute by the courts of other states; but courts, with full knowledge of the history of this legislation, and knowing that its chief purpose is as stated above, should, we think, upon all questions of construction, where the rule adopted by other states is

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not plainly erroneous, be disposed to follow the construction given to the act by the courts of the states in which the act has heretofore been adopted and construed; and particularly should this be true where the statute involves a question upon which the authorities, independent of statute, are so greatly divided as they are upon the question presented in the case at bar, for by no other course may uniformity be obtained; and, if the statute, thus construed, works a hardship in any locality, it may be corrected by legislation.

Other cases construing this statute, in harmony with the foregoing decisions from New York and Missouri, are *First National Bank v. Bank of Cottage Grove,* 59 Ore. 388, 117 Pac. 293; *Farmers' & Merchants' Bank v. Bank of Rutherford,* 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817; *Times Square Automobile Co. v. Rutherford Nat. Bank* (N. J.) 73 Atl. 479.

Dean James Bar Ames, in an article in 14 Harvard Law Review, 442, commenting upon the effect of the different provisions of the negotiable instruments law, said of the section now under consideration:

"Since an acceptor, by section 62, engages to pay the bill 'according to the tenor of his acceptance,' he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 87 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not, indeed, all, of the European states."

Under the rule of these authorities, had plaintiff merely accepted the bill drawn upon it, it could not be heard thereafter to deny that the signature of the drawer was genuine, but it would have been held bound upon its promise to pay the check, and to pay it in accordance with the tenor thereof; so, by paying the check, plaintiff is bound to the same effect, for payment is more

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than acceptance, in that it discharges the indebtedness represented by the check after it is accepted. *Bank v. Bank,* 109 Mo. App. 665, 83 S. W. 537; *First Nat. Bank v. Bank of Cottage Grove, supra.*

Nor can plaintiff recover by reason of the indorsement upon the check: "Pay National Bank of Commerce; previous indorsements guaranteed; Kansas City, Mo., Union Trust Company, Tulsa, Oklahoma"—for the guaranty applies only to the indorser, and does not protect the drawee against the risk of cashing the check to which the maker's name is forged. *National Bank of Rolla v. First Natl. Bank of Salem, supra.* Nor can defendant be held as an indorser upon the check, because by section 188 of the act of the Legislature approved March 20, 1909 (section 4622, Comp. Laws 1909), it is provided:

"Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon."

See authorities cited on first point in this opinion.

It follows from the foregoing views that the judgment of the trial court should be affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., absent, and not participating.

W. H. ASHLEY SILK CO. v. OKLAHOMA FIRE INS. CO.

No. 1919. Opinion Filed July 23, 1912.

(125 Pac. 449.)

APPEAL AND ERROR—Decisions Reviewable—Order Sustaining Demurrer. Under section 6067, Comp. Laws 1909, an appeal may be taken from an order sustaining a demurrer to a petition prior to the entry of a final judgment against the pleader.

(Syllabus by the Court.)

Error from District Court, Muskogee County; John H. King, Judge.

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Opinion of the Court.

Action by the W. H. Ashley Silk Company against the Oklahoma Fire Insurance Company. Demurrer to petition sustained, and plaintiff brings error. Reversed and remanded, with directions.

Stewart & Stewart, for plaintiff in error.

Brook & Brook, for defendant in error.

KANE, J. This is an appeal from an order sustaining a demurrer to the petition. Counsel for defendant in error, in their brief, do not controvert the contention of counsel for plaintiff in error on the merits, but contend that, inasmuch as the appeal was taken prior to the entry of final judgment against the pleader, the same must be dismissed, and cite *Grunawalt v. Grunawalt,* 24 Okla. 756, 104 Pac. 905, as an authority to that effect. We do not think that case is in point. The case of *Wesley et al. v. Diamond et al.,* 26 Okla. 170, 109 Pac. 524, is more analogous. In the latter case it was held:

"Under section 6067, Comp. Laws 1909, an order that involves the merits of an action or some part thereof may be reversed, vacated, or modified by the Supreme Court before the final judgment is rendered in the cause in the trial court."

Section 6067, *supra,* specifically provides that an appeal lies from an order which sustains or overrules a demurrer.

The judgment of the court below must be reversed and the cause remanded, with directions to overrule the demurrer.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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STATE v. RADER *et al.*

No. 1946. Opinion Filed July 23, 1912.

(125 Pac. 726.)

SHERIFFS AND CONSTABLES—Action on Bond—Parties. The state is a proper party plaintiff in an action upon the official bond of a sheriff to recover the penalties prescribed by sections 3371, 3372, and 3373, Comp. Laws 1909.

(Syllabus by the Court.)

Error from District Court, Ellis County; G. A. Brown, Judge.

Action by the State against Geo. M. Rader and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

C. B. Leedy, for the State.

S. A. Miller, for defendants in error.

KANE, J. This was an action, commenced by the plaintiff in error, plaintiff below, against the defendant in error, George M. Rader, as sheriff of Ellis county, and his bondsmen, to recover penalties accruing to the county by reason of alleged violations of sections 3371, 3372, and 3373, Comp. Laws 1909. A demurrer was sustained to the petition of the plaintiff, upon the ground that the action was not commenced in the name of the county. This was error. Section 3373 provides that:

"Any sheriff who shall fail to make to the board of county commissioners a quarterly report under oath as herein required, shall forfeit to the county twenty-five dollars for each day that he shall willfully fail to do so, to be recovered from him or his bondsmen as in other cases."

Sections 1747 and 1748, Comp. Laws 1909, provide that the sheriff shall execute bond to the state of Oklahoma, and prescribe the conditions of the same.

The contention of counsel for defendants in error is that, inasmuch as the county is the real party in interest, it, and not the

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state, must prosecute the action, notwithstanding the bond runs to the state. This exact question was passed upon by the Supreme Court of the territory in *McClogan et al. v. Territory of Oklahoma et al.*, 5 Okla. 567, 49 Pac. 1018. That was an action on a forfeited recognizance. Objection was made to the same being prosecuted in the name of the territory because the statute provides that the money recovered would not go to the territory, but to the county for the benefit of the school fund. Mr. Justice Bierer, who delivered the opinion of the court in that case, said:

"Gen. St. sec. 3898, section 26 of the chapter on civil procedure [section 5558, Comp. Laws 1909], provides 'every action must be prosecuted in the name of the real party in interest except as otherwise provided in section 28; but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract.' Gen. St. section 3900, section 28 of the Code of Civil Procedure [section 5560, Comp. Laws 1909], provides that: 'An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly anthorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted.' Section 5503, under which the recognizance sued on was given, provides for such undertakings being made in the name of the territory, and the territory, we think, should be held to be a person, and therefore authorized to sue as one in whose name a contract is made for the benefit of another, within the meaning of this section 28."

The judgment of the court below must be reversed and the cause remanded, with directions to proceed in conformity with this opinion.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ,. concur.

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BANKS v. CLARK.

No. 2120. Opinion Filed July 23, 1912.

(125 Pac. 724.)

APPEAL AND ERROR—Dismissal—Failure to File Brief. Same as that in **Leavitt et al. v. Commercial National Bank**, 26 Okla. 164, 109 Pac. 71.

(Syllabus by the Court.)

Error from District Court, Tulsa County;
L. M. Poe, Judge.

Action between William Banks and A. D. Clark. From the judgment, Banks brings error. Dismissed.

Hainer & Martin, for plaintiff in error.

J. J. Henderson, for defendant in error.

WILLIAMS, J. Petition in error, with case-made attached, was filed in this court on November 7, 1910. No briefs have been filed by plaintiff in error, as required by rule 7 (20 Okla. viii, 95 Pac. vi).

The appeal is dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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HARLOW v. BOARD OF COM'RS OF PAYNE COUNTY *et al.*

No. 2136. Opinion Filed July 23, 1912.

(125 Pac. 449.)

1. **BRIDGES—Construction by Counties—Statutory Provisions.** In measuring the distance between the proposed location of a bridge to the nearest bridge on the same stream, to determine whether the proposed location is not nearer than six miles to the nearest bridge, as is required by section 7881, Comp. Laws 1909, the statute contemplates and requires that said measurement shall be upon a straight line between said points.

2. **SAME—Authority of County Commissioners.** Under section 6 of an act of the Legislature of 1903 entitled "An act authorizing the construction of bridges" (Sess. Laws 1903, p. 246), as amended by section 3 of an act of the Legislature approved March 10, 1905 (Sess. Laws 1905, p. 354), where the bridge to be constructed is more than 200 feet in length, and crosses a stream that is the boundary line between two townships, the board of county commissioners is authorized to contract for the construction of such bridge only when the adjoining townships have offered and agree with the county to pay each one-half of one-fourth of the cost of construction of said bridge; and the board of county commissioners is without power, under said statute, to contract for the construction of such a bridge where the adjoining townships have offered to pay only one-third of one-fourth of the cost of the construction of said bridge, and an incorporated town in one of said townships offers to pay one-third of one-fourth of such cost.

3. **COUNTIES—Remedies of Taxpayers—Existence of Remedy at Law.** A resident taxpayer may invoke the aid of a court of equity to enjoin the carrying out by a board of county commissioners of a void contract for the construction of a bridge, to be paid for in part by taxes levied upon the taxpayers of the county, although such taxpayers may have had the right of appeal to the district court from the order of the board of county commissioners, ordering the construction of such bridge.

(Syllabus by the Court.)

Error from District Court, Payne County;
A. H. Huston, Judge.

Action by George Harlow against the Board of County Commissioners of Payne County. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with instructions.

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Burford & Burford, for plaintiff in error.

D. W. Weldon, Co. Atty., *C. H. Lowry, Robt. A. Lowry,* and *Burdick & Grubbs,* for defendants in error.

HAYES, J. Plaintiff, a resident taxpayer of Payne county, brought this action in the court below to enjoin the board of county commissioners of that county from entering into and carrying out a contract for the construction of a certain bridge over a river in that county, and from levying a tax to raise funds to pay for the construction of the bridge, and to enjoin the county treasurer from extending such tax upon the tax rolls of the county, and from collecting same. Upon the application of plaintiff the judge of the district court, at chambers, granted a temporary injunction, enjoining and restraining defendants in error from doing any of the aforesaid acts. This temporary injunction was subsequently, upon motion of defendants in error, dissolved by the court; and it is from the order dissolving the injunction that this appeal is prosecuted.

Plaintiff in error, by his contentions in this court, presents for our consideration two legal propositions. The first proposition urged is that the board of county commissioners are without authority to contract for the construction of the proposed bridge, because it is located within a distance of less than six miles of another bridge constructed across the same river, which is prohibited by section 2 of an act of the Legislature approved March 11, 1903 (Sess. Laws 1903, p. 244; section 7881, Comp. Laws 1909). The proposed bridge is to be constructed at a point on the Cimarron river where said river forms the boundary line between Mound and Union townships, in Payne county. These two townships have agreed with the county to pay each one-third of one-fourth of the cost of construction of said bridge, and the town of Cushing, an incorporated town in one of said townships, has agreed to pay one-third of one-fourth of such cost, and the county is to pay the remaining three-fourths. There has never been any agreement of the board of trustees of the adjoining townships to pay equally one-fourth of the expense of the construction of said bridge; and plaintiff's second prop-

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osition is that, because of this fact, and by reason of section 6 of an act of the Legislature approved March 11, 1903 (Sess. Laws 1903, p. 246), as amended by section 3 of an act of the Legislature approved March 10, 1905 (Sess. Laws 1905, p. 354; section 7885, Comp. Laws 1909), the board of county commissioners is without authority to contract for the construction of the bridge. The act of the Legislature approved March 11, 1903, entitled "An act authorizing the construction of bridges" (Sess. Laws 1903, p. 244), provides for the construction and repairing of bridges across streams in the state where such bridges exceed the length of 200 feet between the banks of the stream on which any bridge is constructed. Section 2 of that act, which applies to the first proposition presented by plaintiff in error, reads as follows:

"Said bridges shall be located at any point on said river or rivers, provided no bridge shall be built on any such river under the terms of this act nearer than six miles to any other bridge located and built: Provided further, that more than one bridge may be built within one mile of an incorporated town or city."

It is admitted that there is no incorporated town or city within one mile of the location of the proposed bridge; and it is also admitted that upon a straight line, or by the course of the stream, it is less than six miles to another bridge upon said stream, but that by the usual traveled public road it is more than six miles to said bridge; and the board of county commissioners, construing the statute to mean six miles by the public highway, determined that it had authority to contract for the construction of the bridge. This construction of the statute by the board of county commissioners, we think, was incorrect. A somewhat similar question was considered in *City of Blackwell v. City of Newkirk,* 31 Okla. 304, 121 Pac. 260, where it is said:

"From an examination of the authorities we have been able to make, they appear to be practically in accord that, where distance is to be determined, it must be by a straight line, unless there is something in the nature of the case, or in the context of the act or instrument, indicating an intention to follow a different method."

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The evident purpose of authorizing bridges to be constructed if not within six miles of each other, and prohibiting them from being constructed nearer than six miles to another bridge, is to provide for the construction of bridges at points upon any stream convenient to the traveling public coming from every direction to cross such stream; and at the same time to deny to the municipal authorities and to the board of county commissioners the power to burden the taxpayers by constructing too many bridges, or by constructing them nearer to each other than the reasonable necessity demands. It is urged by defendants in error that because a bridge constitutes a part of the road the act should be construed as requiring the measurement to be made by the road leading from one bridge to the other. In providing for the location of these bridges and the distance between them, the convenience of the traveling public residing upon the highway leading from one bridge to another was not in the minds of the Legislature; for, as a rule, the travel direct from one bridge to the next nearest bridge is of no great consequence, and rarely would there be a public highway leading direct from one bridge to the next nearest; for, in most instances, the greater part of the public travel will be across the river, rather than up and down its course. Measuring the distance between the bridges upon a straight line will result in a uniform system; one that will enable counties and municipalities therein to construct bridges to meet the reasonable wants of the traveling public, and at the same time protect against extravagance and the imprudent location of bridges in close proximity; for, if the distance is to be measured by the public road, it could and probably would not infrequently happen, on account of there being no public road upon a direct line, or upon an approximately direct line from the location of one bridge to the other, that the distanec by traveled road would be greater than the limit fixed by the statute, and at the same time the bridges would be a very short distance apart. The same would result if the distance is to be measured by the course of the stream, where the stream is irregular and runs in curves. Two points upon a river more than six miles apart by public road today may be tomorrow, because of the opening of

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new roads, less than six miles apart. A bridge when begun may be without the limitations of the statute, but be within them when completed. There is nothing in the act to indicate that a different measurement than a straight line measurement of the distance is contemplated; and, if a measurement by the public highway is adopted, it will render it possible, in many instances, for the municipal authorities to defeat the very purpose of the limitation upon their power to construct these bridges, for the distance between any two points upon a stream can be made to vary by changing the highways; and, without reviewing the authorities cited in *City of Blackwell v. City of Newkirk, supra,* but referring to our discussion of a similar question in that case, and to the cases cited in that case, we hold that the statute here involved contemplates the measurement of the distance upon a straight line.

By act of the Legislature approved February 17, 1911 (Sess. Laws 1911, p. 41), section 2 of the act of 1903, *supra,* prohibiting the building of a bridge within six miles of another bridge upon the same stream, was repealed; but this repealing act was enacted several months after the order complained of herein was rendered in the court below, and after this appeal had been perfected. By reason of section 54, art. 5, of the Constitution, this repealing act therefore does not affect this proceeding.

It is also urged that the distance from the location of the proposed bridge to the nearest bridge is a question of fact which the board of county commissioners was empowered to determine; and that their determination cannot be reviewed in this proceeding. But, if any mistake was made by the board of county commissioners, it is not a mistake of fact, but a mistake in the construction of the statute defining its powers. The controversy revolves around what method of measuring the distance is contemplated and authorized by the statute. After the method of measurement is determined, there is no controversy about whether the construction of the proposed bridge is without or within the power of the board, except as that power is affected by the second proposition to be considered later. A board of county commissioners cannot misconstrue a statute as granting to it a power

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not granted, and thereby foreclose the court from restraining it within the jurisdiction conferred upon it, when the application is made therefor by an injured party.

The statutory provisions bearing upon the second proposition are to be found in the act of the Legislature of 1903, as amended by the act of 1905, both of which acts have been referred to above. Section 4 of the act of 1903 authorizes the board of trustees of any organized township, with the consent of the board of county commissioners, to order the construction of bridges exceeding 200 feet in length across streams passing through such township, and authorizes the board of trustees to pay for the construction of any such bridge by drawing warrants on the road and bridge fund levied on all property in the township, or specially levied for the purpose of constructing said bridge. The same section also makes it the duty of the township board, when ordering the construction of any such bridge, to make, at the time it levies taxes in said townships, a special levy to pay for such bridge, which shall be in addition to the other taxes in the township, and which shall not exceed five mills on the dollar per year. By section 5 the township trustees are required, when they have determined that the construction of any bridge is necessary, and they have performed the acts provided by the statute, to certify such fact to the board of trustees of any incorporated town or city in the township directly interested in the construction of said bridge; and it is made the duty of the board of trustees of said city or town thereupon to make a special levy to pay for said bridge, which shall be in addition to all other taxes in such incorporated town or city, and which shall not exceed five mills per year, and also makes it the duty of the township board to certify its acts to the board of county commissioners; whereupon the board of county commissioners, if it deems the bridge necessary and approves its construction, shall proceed to offer for bids and let the contract for its construction, two-thirds of the cost of the bridge to be paid by the organized townships, and one-third to be paid by the county. The bridge must be built under the supervision of the county commissioners, and it is to be and remain the property of the county. This section

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of the act was amended by the act of 1905; but it is not necessary to notice the changes effected by the amendatory act. Section 6 of the act of 1903 reads as follows:

"When any stream requiring a bridge of over two hundred feet or more in length as contemplated in this act is the boundary line between two townships in the same county, then it shall be necessary for the board of township trustees of each township bordering on said stream to join in the construction of said bridge as herein provided, and to bear equally the two-thirds of the expense of construction of said bridge as herein provided, and to pay for the same as herein provided, the remaining one-third to be paid by the county and said bridge to be constructed by the board of county commissioners if said board finds the bridge necessary and approves its construction, and to remain the property of the county as provided in this act."

This section was amended by section 3 of the act of 1905 (Sess. Laws 1905, p. 354); but the only change made by the amendatory act is in the portion of the cost of the bridge that shall be paid by the county, and the portion that shall be paid by the adjoining townships. Neither the act of 1903 nor the amendatory act of 1905 contains any special procedure to be followed by the board of township trustees in ordering the construction of bridges authorized by section 6 of the act of 1903, as amended by section 3 of the act of 1905; but by the provisions of said section 6, as amended, to the effect that, in order for such bridge to be constructed, "it shall be necessary for the board of township trustees of each township bordering on said stream to join in the construction of said bridge *as herein provided,* and to bear equally one-fourth expense of such construction of said bridge *as herein provided,* and to pay for the same *as herein provided* * * *" (italics ours), it was intended to provide that the townships, for the purpose of constructing any bridge under this section, should follow the same procedure as is prescribed for the construction of a bridge by an organized township under section 3, where the bridge is to be constructed across a stream within a township. That procedure requires that, before the board of county commissioners can act and order the construction of a bridge, the board of trustees of the organized townships must agree and offer to pay equally one-fourth of the cost of construc-

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tion of said bridge, and in paying same shall issue their warrants therefor, to draw six per cent. interest from the date of their issue; that when ordering the construction of the bridge they shall, at the time of levying taxes in the townships, make a special levy to pay for said bridge. These acts shall be certified by the township trustees of the townships to any incorporated city or town in the townships directly interested, who likewise shall make a special levy; and all these acts of the boards of trustees of the two townships must be certified by said boards to the county commissioners, who will then be authorized to act. What portion of the expense of construction of these bridges the incorporated towns and cities in the bordering townships are required to aid the townships with and to bear is not here necessary to determine. It is apparent from the statute that the county deals only with the townships. There is no provision for incorporated towns and cities to certify anything to the board of county commissioners. It is the townships that must order the construction of the bridge and agree to pay the portion required by the statute, and to provide for payment thereof. There is no provision in the statute that authorizes any agreement between the county and any incorporated town or city for the payment of any portion of this cost. It is the board of trustees of the townships that deals with incorporated cities and towns, and they are authorized to deal only with the board of county commissioners. In the instant case no offer has been made by the boards of trustees of the two townships to pay that part of the cost of constructing the bridge the statute requires; nor has it been certified to the board of county commissioners that all the acts required by the statute of the township boards have been performed. In lieu thereof, it is sought to have the bridge constructed upon the offer of each of the two townships to pay less than the part required by the statute to be paid by them, because an incorporated town offers, also, to pay a part.

"It is a settled rule that the grant of powers to boards of county commissioners must be strictly construed, because when acting under special authority they must act strictly on the conditions under which the authority is given; that they can exercise only such powers as are specifically granted, or as are incidentally

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necessary for the purpose of carrying into effect such powers; and, where the law prescribes the mode which they must pursue in the exercise of such powers, it, as a rule, excludes all other modes of procedure." (*Allen et al. v. Board of County Commissioners of Pittsburg County*, 28 Okla. 773, 116 Pac. 175.)

At the same term of the Legislature at which the act of 1903, heretofore construed, was enacted, and just six days thereafter, there was enacted and approved an act of the Legislature entitled "An act relating to roads and bridges, etc." Chapter 29, Sess. Laws 1903, p. 236. Section 3 of that act reads as follows:

"The board of county commissioners in each county shall have sole control of all bridges more than twenty feet long, and shall contract for the erection and maintenance of the same as hereinafter provided. The board of county commissioners may in their discretion enter into an agreement with any township board within said county whereby money may be appropriated from the county road and bridge fund for the purpose of constructing or improving any road or bridge in said township, or on any boundary line of said township. Any incorporated city or town may appropriate funds to aid the township or county in the construction or improvement of any road or bridge in such county."

There is nothing, however, in this section that conflicts with the provisions of the act of the same Legislature, heretofore construed, and as amended by the act of 1905. The foregoing section of the statute confers upon the board of county commissioners of each county sole control of all bridges more than 20 feet long, and power to contract for the erection and maintenance thereof. The act of March 11, 1903, as originally enacted, or as amended, does not take away from the board of county commissioners control of any bridge whatever, nor deny it the right to contract for the erection thereof, nor release it from the maintenance of same. Said act attempts only to prescribe the procedure by which certain bridges may be constructed; and section 3 thereof, just quoted above, does not authorize the board of county commissioners to make any contract with any incorporated city or town for the construction of any bridge. The sole power conferred upon it, relative to the construction of bridges jointly with any other authority, is that the commissioners "may in their

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discretion enter into an agreement with any township board within said county. * * *" Incorporated cities and towns are authorized to aid any township of a county in the construction of any bridge or road by appropriating funds for that purpose; that is, in order to induce the county to construct or repair bridges or roads, or to induce a township to do so (either alone or upon agreement between the board of county commissioners and a township board), an incorporated city or town may donate to the county or township any fund to aid in its bearing its portion of the expense of such improvement. But the agreement for the construction of a bridge, either in a township, or on any boundary line thereof, must be between the board of county commissioners and the township.

Defendants urge that plaintiff's action for an injunction will not lie, because he has a speedy and adequate remedy at law by an appeal from the action of the board of county commissioners to the district court. In support of their contention that plaintiff has such right of appeal, defendants cite and rely upon section 1690, Comp. Laws 1909, as construed in *Smith et al. v. Board of County Commissioners of Rogers County,* 26 Okla. 819, 110 Pac. 669. The decision in the last-mentioned case was made by this court without considering, and without having our attention called to, *Cummings v. Bd. of County Commissioners of Noble County,* 13 Okla. 21, 73 Pac. 288, with which it seems to be in some respects in conflict; but, if we assume in the present case that plaintiff has the right of appeal, still he may maintain this action. The board of county commissioners, for the reasons already stated, in contracting for the construction of the bridge, has acted without authority, and its act in attempting to carry out this contract, and to levy a tax for that purpose upon the taxpayers of the county, is illegal and void; and it may be restrained from carrying out this void contract by an injunction, without resort to the remedy of appeal. *Harney v. Indianapolis, Crawfordsville & Danville R. R. Co. et al.,* 32 Ind. 244; *Fremont County v. Brandon,* 6 Idaho, 482, 56 Pac. 264; *Dunbar v. Bd. Com'rs of Canyon County,* 5 Idaho, 407, 49 Pac. 409; *Fones Bros. Hdw. Co. v. Erb et al.,* 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353. And

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plaintiff, being a resident taxpayer, may invoke the aid of a court of equity to prevent the illegal creation of the debt for the construction of the bridge, and of the illegal disposition of the money in the payment of such debt. *Hannan v. Bd. of Education of City of Lawton et al.*, 25 Okla. 372, 107 Pac. 646, 30 L. R. A. (N. S.) 214; *City of El Reno et al. v. Cleveland-Trinidad Paving Co.*, 25 Okla. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Bowles v. Neely et al.*, 28 Okla. 556, 115 Pac. 344.

It follows that the judgment of the trial court must be reversed and the cause remanded, with instructions to proceed in accordance with the views expressed in this opinion.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

CITY OF SHAWNEE v. STATE PUB. CO. *et al.*

No. 2531. Opinion Filed July 23, 1912.

(125 Pac. 462.)

APPEAL AND ERROR — Record — Case-Made—Settlement. Where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge **pro tempore** ceases upon the expiration of the time fixed for suggesting amendments, and a case-made settled by him after that time is a nullity.

Error from Superior Court, Pottawatomie County; C. H. Ennis, Judge pro tem.

Action between the City of Shawnee and the State Publishing Company and others. From the judgment, the City brings error. Dismissed.

E. E. Hood, City Atty., and *W. M. Engart,* for plaintiff in error.

B. B. Blakeney, for defendants in error.

HAYES, J. This cause was tried in the court below before a judge *pro tempore,* who on the 29th day of September,

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1910, overruled a motion for a new trial and made and entered an order extending the time in which plaintiff in error could make and serve a case-made for a period of 90 days from said date. Two days thereafter the regular judge of the court also made an order extending the time for making and serving a case-made for a period of 90 days from said date. Each of said orders provided that defendant in error should have ten days after service of the case-made in which to suggest amendments; the case-made to be settled and signed on five days' notice by either party. It is conceded by both parties to this proceeding that both of the orders extending the time within which to serve the case are valid, and that the time for such service under the second order expired on December 30, 1910. On December 21, 1910, the case was served by plaintiff in error upon defendant in error, and the time for suggesting amendments thereto expired on the 31st day of the same month. On the 29th day of December, 1910, a second order was granted by the regular judge extending the time within which to serve a case-made. This order was made after the case had already been served. As it is admitted, and correctly so we think, by both parties, that this order does not affect the question now under consideration, we shall not refer to it again. No notice fixing a time to settle the case was served by either party before the expiration of the time in which to suggest amendments; but thereafter, upon notice, the case was finally settled and signed by the judge *pro tempore* on the 18th day of January, 1911.

A motion to dismiss the proceeding in error in this court challenges the authority of the judge *pro tempore* to sign and settle the case at the time he did. It has been often determined in this court that only the judge before whom the cause was tried has authority to sign and settle the case. *Upton v. American Trust Co.*, 31 Okla. 456, 122 Pac. 159; *Oligschlager v. Grell*, 13 Okla. 632, 75 Pac. 1131. This rule has been modified by a recent statute so that under certain contingencies the successor of the trial judge may settle the case; but the conditions upon which that authority vests in the succeeding judge do not exist in this case. The motion before us presents for the first time the ques-

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tion as to when the authority of a judge *pro tempore* to sign and settle a case exists. In *Burnett v. Davis,* 27 Okla. 124, 111 Pac. 191, the cause was tried before a regular judge, whose term of office was caused to expire by a change in the district which transferred the county in which the cause was pending from the district in which it was tried to another district, and the case went off in this court on a motion to dismiss, because the term of the trial judge did not expire during the time for making and serving a case, nor pending the time fixed for settling and signing same. In that case it was held that the statute gives authority to the judge who tries a case to certify, sign, and settle the same after he is out of office only when his term of office shall have expired or expires during the time fixed for making, settling, or signing a case; and, if no time is fixed for settling and signing the same by order of the court, then during the time fixed for making and serving the case. The decision in *Burnett v. Davis, supra,* was based upon section 6075, Comp. Laws 1909 (section 4742, Wilson's Rev. & Ann. St. 1903).

This court, following the Kansas cases, has several times determined that a judge *pro tempore* has no power, after he ceases to sit as a court in the trial of a cause, to extend the time for making and serving a case-made in an action tried before him; and that such extension can be granted only by the regular district judge, who is, in fact, in possession of the office. *City of Shawnee v. Farrell,* 22 Okla. 652, 98 Pac. 942; *Horner v. Goltry & Sons,* 23 Okla. 905, 101 Pac. 1111; *Casner v. Wooley,* 28 Okla. 424, 114 Pac. 700. The writer of this opinion, uncontrolled by the former decisions of this court and of the Supreme Court of Kansas, from which state our statute of procedure has been adopted, is of the opinion that the sounder and more just rule and the one supported by the best reason is that the power of a judge *pro tempore,* selected or appointed to try a cause in which the regular judge is disqualified, does not cease at the end of the trial, but that his power continues with sufficient authority in him to make any and all orders necessary for the final disposition of the cause, including any order that may be necessary for lodging the case in the appellate court; but, whatever may be the personal

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views of the writer upon this question, the rule has been too long established in this jurisdiction to be disturbed now, and, in determining the question now before us, it must be done in view of the holdings of this court that the case-made must be settled by the judge *pro tempore* before whom it was tried, and yet his power for some purposes is ended when he ceases to sit as a judge in the trial of a cause. The only statutory provision authorizing an ex-judge to sign and settle a case-made is to be found in section 6075, Comp. Laws 1909, which in part provides:

"And in all causes heretofore or hereafter tried, when the term of office of the trial judge shall have expired or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign or settle the case in all respects as if his term had not expired. * * *"

In the last clause of section 9, art. 7, of the Constitution, it is provided:

"In the event any judge shall be disqualified for any reasons from trying any cause in his district, the parties to such case may agree upon a judge *pro tempore* to try the same; and if such parties cannot agree, at the request of either party, a judge *pro tempore* may be selected by the members of the bar of the district present at such term."

Sections 2 and 3 of the act of the Legislature providing a method for the selection of a judge *pro tem.* (article 1, c. 14, Sess. Laws 1909) reads in part as follows:

"In any case civil or criminal, pending in any court of record in the state * * * the parties or their attorneys of record * * * may agree upon some member of the bar * * * to act as special judge to hear and decide and render judgment in the same manner and to the same effect as such disqualified judge could have rendered but for his disqualification.

"If the cause be a civil one, and the parties or their attorneys of record do not agree, the clerk of the court in which the cause is pending shall hold an election for the selection of a special judge or judge *pro tempore* to try such causes."

Accurately speaking, a judge *pro tempore* has no term of office. He is selected for a definite purpose, to wit, to try a cause in which the regular judge is disqualified. The statute does not attempt to fix his term; nor does he take the term of office of the regular judge, who continues as the regular judge of the

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court with full authority in all cases except the one in which he is disqualified. The judge *pro tempore* becomes clothed with all the power of the regular judge as to such cause, necessary for him to hear such cause and render judgment therein; and when the cause has been tried and judgment rendered, his powers cease, unless continued by some order of the court. Discussing the question here involved, the Supreme Court of Kansas, in *Columbia Mfg. Co. et al. v. Stoddard Mfg. Co.*, 61 Kan. 640, 60 Pac. 320, after reviewing the case of *K. & C. P. Ry. Co. v. Wright*, 53 Kan. 272, 36 Pac. 331, said:

"The above case is, in effect, a holding that the term of office of a judge *pro tempore*, is limited to such specific periods as he sets for the making and service of the case and the suggesting of amendments thereto, and the settlement of the case, and that, if within such term of office no time is fixed for the settlement of the case, such term cannot be prolonged by specifying an indeterminate period within which the parties may come before him for the settlement of the case, or, at least, that if the time for its settlement has been left indeterminate, it must be determined by a notice given within the term fixing a definite date for the settlement of the case."

And in *Missouri Pacific Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050, the same court, in the fourth paragraph of the syllabus, held:

"A judge *pro tem.*, upon overruling a motion for a new trial and rendering final judgment, allowed a certain time for the making and service of a case-made for this court, fixed a time within which amendments were to be suggested, and ordered that it be settled upon ten days' notice by either party. *Held*, that the term of office of such judge expired after the last day fixed for suggesting amendments, and that a case-made settled and signed by him after that time will not be considered."

And in *Butler v. Scott*, 68 Kan. 512, 75 Pac. 496, it is said:

"In cases tried before a judge *pro tem.* it is obvious that the contingency referred to cannot arise. The term of office of a judge *pro tem.*, where no time is fixed for settling a case, is held to be coextensive with the time allowed for suggesting amendments, and therefore cannot expire before the time fixed for making the case."

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The foregoing decisions of the Kansas court were made under a statute, providing for the service and settling of a case-made, the same as exists in this state, and under statutes relative to the selection of *pro tempore* judges very similar to the statutory and constitutional provisions of this state; and we adopt the rule of those cases and hold that, where no time has been fixed either by order of court or by notice given by the parties within the time for serving a case and suggesting amendments thereto for settling a case, the authority or term of a judge *pro tem.* ceases upon the expiration of the time fixed for suggesting amendments, and a case-made settled by him after that time is a nullity.

In the case at bar, no notice was given by either party fixing the time for settling the case before the expiration of the time within which to suggest amendments; and the case was not signed and settled by the judge *pro tem.* until after the expiration of said time.

It therefore follows that this proceeding in error should be dismissed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

LAWSON *et al.* v. ZEIGLER.

No. 2464. Opinion Filed July 23, 1912.

(125 Pac. 724.)

APPEAL AND ERROR—Record—Case-Made—Time for Making and Serving. An order extending the time for making and serving a case-made, made after the expiration of the time therefore fixed by order of the court or trial judge, is void.

(a) A "case-made" made and served within the time fixed by such void order is a nullity and cannot be considered as a case-made by this court.

(Syllabus by the Court.)

Error from District Court, McIntosh County; Preslie B. Cole, Judge.

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Opinion of the Court.

Action between W. H. Lawson and others and Frederick Zeigler. From the judgment, Lawson and others bring error. Dismissed.

E. J. Van Court, for plaintiffs in error.

W. C. Reeves, amicus curiae.

WILLIAMS, J. On December 14, 1910, the motion for a new trial was overruled. It was ordered that defendants (plaintiffs in error) be allowed 30 days to make and serve a case-made. This 30 days expired with the 13th day of January, 1911. The case-made was served on January 14, 1911, one day after the expiration of the time allowed for making and serving the same. On February 6, 1911, 24 days after the expiration of the time allowed for making and serving the case-made, the attorneys for the respective parties stipulated that the plaintiffs in error should have 30 days after the 8th day of February, 1911, in which to have the case-made settled and signed. On February 7, 1911, the court entered an order that an extension of time be granted, to wit, 30 days from February 8, 1911, in which to have the case-made served.

That an order made after the expiration of the time allowed for making and serving a case-made, extending the time for such purpose, is a nullity, and such case-made served out of such time cannot be considered on appeal, has been settled by this court. *Lovejoy, Russell & James v. Graham et al., ante,* 124 Pac. 25, and authorities therein cited.

It follows that this proceeding in error must be dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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UNITED STATES EXPRESS CO. v. STATE *et al.*

No. 3291. Opinion Filed July 23, 1912.

(125 Pac. 448.)

CARRIERS—Regulations—Orders of Corporation Commission—Evidence. Evidence examined, and **held** sufficient to sustain the justness and reasonableness of the order of the Corporation Commission.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Appeal by the United States Express Company from an order of the Corporation Commission, requiring the company to establish and maintain an uptown office in the town of Hobart for the transaction of its business. Order affirmed.

Cottingham & Bledsoe, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for appellees.

KANE, J. This is an appeal from order No. 256 of the Corporation Commission, requiring the appellant to establish and maintain an uptown office in the town of Hobart for the transaction of its business, to be located at some point on the square in the center of the town, and to collect and deliver express packages anywhere in the corporate limits of the city. After a full hearing held at the city of Hobart, and an exhaustive finding of fact, the Commission concluded that "the citizens of Hobart are entitled to an uptown office for the transaction of their business with said United States Express Company, and that receipts from its business at said office justifies the small additional expense." The only ground of complaint is that the order is unjust and unreasonable. After a careful consideration of the record, we are satisfied that the findings and conclusions of the Commission are amply supported by the evidence.

"On appeal from an order of the Corporation Commission, the presumption obtains * * * that the order is reasonable,

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just, and correct; and he who complains on appeal of such order has upon him the burden of establishing the unreasonableness, unjustness, or incorrectness of such order." (*A., T. & S. F. Ry. Co. v. State,* 23 Okla. 510, 101 Pac. 262, 18 Ann. Cas. 102; *C., R. I. & P. Ry. Co. v. State,* 24 Okla. 370, 103 Pac. 617, 24 L. R. A. [N. S.] 393; *M., K. & T. Ry. Co. v. State,* 24 Okla. 331, 103 Pac. 613; *K. C., M. & O. Ry. Co. v. State et al.,* 25 Okla. 715, 107 Pac. 912.)

The order of the Commission is affirmed.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

ATCHISON, T. & S. F. RY. CO. v. STATE *et al.*

No. 3318. Opinion Filed July 23, 1912.

(125 Pac. 721.)

CARRIERS—Regulations—Orders of Corporation Commission—Evidence. Where the railway company is charged with not having filed a tariff sheet within the time prescribed by the Corporation Commission, and the evidence shows that such tariff sheet was not so filed, unless the evidence showing such failure to file also discloses that the act of omission was not willful, the presumption of law is that the act was willful.

(a) Such act of omission having been proved by evidence, which did not disclose that it was not willfully done, the burden shifted to the railway company to prove that such act of omission was not willful.

(b) **Held** that, under the facts in this record, the Corporation Commission was justified in finding that such act of omission was willful.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Appeal by the Atchison, Topeka & Santa Fe Railway Company from an order of the Corporation Commission. Order affirmed.

Cottingham & Bledsoe, for appellant.

Chas. West, Atty. Gen., *Chas. L. Moore,* and *E. C. Patton,* for appellee.

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WILLIAMS, J. The appellant by this appeal seeks to have reversed an order of the Corporation Commission, imposing a fine of $25 on appellant for failure to comply with the Commission's order No. 198, in that it did not file a certain tariff, to wit, 8123-D, within the time prescribed in said order, which is in part as follows:

"Each railroad and railway company named above shall, on or before the date this order becomes effective, file in the office of the Corporation Commission of the state of Oklahoma, in the city of Guthrie, state of Oklahoma, one copy of each of the following documents affecting the transportation of freight and passengers upon its line of railroad and railway in the state of Oklahoma: Rule No. 1. General freight and passenger tariffs, both state and interstate, local and joint, together with all effective amendments and supplements. Rule No. 8. Also at the time of their issuance and before effectiveness, copies of all documents named above that may hereafter be issued for application upon such line of road."

The tariff on account of which this prosecution was based was as to rates to be used on fruit or vegetables loaded in refrigerator cars, and covers the charge for refrigerator service. A party in El Reno complaining to the Commission of the rate assessed by the appellant on a car of cabbage from Topeka, Kan., an examination was made by the Commission, and it was ascertained that the previous tariff, to wit, tariff C, had been filed, but that D had not, and that there was no way to ascertain the rate. The complaint was then filed. After the filing of the complaint the appellant filed the tariff with the Corporation Commission.

On the part of the appellant, the chief of the tariff bureau of the appellant testified that as to said tariff the railway company's records showed "that a copy of it was sent to the Oklahoma Commission on May 6, 1910, or a month before the tariff became effective." He further testified as follows:

"We have no intention whatever of not wanting to file the tariff, because we filed the previous tariff, or the tariff that it canceled; and the instructions are and have been in effect for quite a few years that tariff that in any way affects Oklahoma rates, whether intra or interstate, a copy should be immediately filed with the Commission; and I don't know of any instances where a copy has not been forwarded to the Commission within

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one or two days after its receipt from the printers. We have a record up there showing all the tariffs we forward to the Commission, and this tariff, before I made the affidavit I looked it up, and our records show that it was forwarded. By Mr. Henshaw: Q. Well, what has been the system of forwarding tariffs? A. We forward by United States mail, unless the quantity is so large that we have to forward by express."

On this evidence the appellant was adjudged guilty of contempt and fined $25. The judgment of the Commission is as follows:

"The information alleges that the defendant violated order No. 198 by failing to file tariff 8123-D prior to the time the same became effective. The evidence shows this tariff, carrying rates to be applied on fruit or vegetables loaded in refrigerator cars, and covering the charges for refrigerator service, was not filed prior to the time the same became effective in the state of Oklahoma, and the Commission did not know of its existence until the shippers wrote to the Commission, complaining of the rate assessed thereunder. The rule covered by this tariff seems to be greatly out of line. All tariffs must be filed with the Interstate Commerce Commission thirty days prior to going into effect, unless special permission is given for them to go into effect upon a shorter notice. The defendant's evidence shows that their records show that a copy of this tariff was sent to the Oklahoma Commission on May 6, 1910, or a month before the same became effective. The defendant further denied any intention whatever of any desire on its part not to file these tariffs, whether the rates covered by such tariff are state or interstate. Tariffs are usually forwarded by United States mail. The Commission has had much trouble in having tariffs filed before they became effective. Railroad after railroad has been let off, without imposing any penalty, upon first one excuse and then another, the same as now offered. This can no longer be tolerated. These tariffs must be filed as provided in the order. The only evidence we have that the defendant made any effort to file the tariff was that their records show that the tariff was sent. Their records could show this and yet be in error. At any rate, the tariff was not filed with the Commission, and, inasmuch as the Commission acknowledges receipt of these tariffs, the defendant, not having any such receipt in its possession, should have seen that the tariff was on file. It is therefore ordered and adjudged that the defendant be fined the sum of $25 and costs for the violation of order No. 198, failing to file the tariff mentioned in the complaint prior to the time it

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went into effect. For all of which cost and fine let execution issue."

It is insisted by the appellant that the evidence is not sufficient to support the judgment of the Commission. There was evidence reasonably tending to show that the tariff was not filed pursuant to the order of the Commission. In fact, the appellant does not seem to contend that the same was so filed.

In *St. Louis & S. F. R. Co. v. State et al.,* 26 Okla. 764, 110 Pac. 759, it was held that:

"* * * Where the railway company admits the acts of violation with which it is charged, but attempts to defend against the proceedings upon the ground that said act was committed through a misapprehension of the order, or as a result of a mistake, the burden is upon the company to establish by competent evidence that its act complained of resulted from such cause."

Though the appellant did not admit the act of violation with which it is charged, yet, if the evidence showed such violation (the Commission so found), then the burden would shift to the appellant; for the law presumes that the act was willfully done.

Section 2829, Comp. Laws 1909 (chapter 25, art. 62), provides:

"The term 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

See, also, *Thurman et al. v. State,* 2 Okla. Cr. 718, 104 Pac. 67.

The tariff not having been filed, and the presumption of law following that it was willfully not filed, and the burden shifting to the appellant, the question arises as to whether, under this record, the appellant has discharged that burden.

In *A., T. & S. F. Ry. Co. v. State and A. Haber,* 31 Okla. 479, 122 Pac. 232, it is said:

"In determining the guilt of a company or corporation charged with contempt in a proceeding like this, whilst it is necessary to find that the violation was willful or intentional, yet in making this determination the Commission is permitted to look at the good faith of the company. The company, through its

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superior officers, must furnish the subordinate officers with reasonable instructions, in order that the subordinates may reasonably and in good faith and with proper diligence comply with the orders of the Commission. Whilst it may be that the subordinate employee may act in good faith and with reasonable diligence under the orders that he may have, yet on account of the carelessness or negleet of the superior officers, there may be a derelictiion."

In that case it was held that the railway company by proof discharged the burden. All the evidence in the record in appellant's favor is that its records show that on May 6, 1911, within the prescribed time, the tariff was mailed to the Commission. There is no evidence showing who made this entry, or under what circumstances it was made, whether by the party whose duty it was to mail such tariff sheets, or some other person. If the tariff sheet was sent by mail, it is to be assumed that when it was received by the Commission it would acknowledge receipt thereof. If such acknowledgment was not received within a reasonable time, diligence and good faith on the part of the appellant, having adopted the system of forwarding such matters by mail, would have required it to make inquiry as to whether same was received. Such seems not to have been done.

It is essential that these tariff sheets be filed at least before such rates go into effect; and, if the appellant is to be excused merely upon the excuse that an entry on its books shows that it was mailed, then it would be very difficult for any conviction for contempt in such matters to be sustained.

The appellant was not performing an act of courtesy in mailing this tariff. It was its duty under the law to file the same with the Commission within the prescribed time. Having availed itself of the convenience of sending the tariff sheet by mail, that did not discharge its duty, because the order was not that it should mail the tariff sheet, but that it should be filed in a certain time.

The Commission was justified in finding that there was not sufficient evidence to show that it was ever mailed, because this entry may have been made by some clerk upon whom no duty was imposed to mail the same, but, knowing that the tariff sheet was

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prepared, entered it on the assumption that the clerk upon whom such duty was imposed would mail it, but who failed to discharge that duty.

We conclude that the judgment of the Commission must be sustained.

TURNER, C. J., and HAYES and KANE, JJ., concur; DUNN, J., absent, and not participating.

STATE v. POOR.

No. 3637. Opinion Filed July 23, 1912.

(125 Pac. 726.)

APPEAL AND ERROR—Presenting Questions in Trial Court—Necessity for Motion for New Trial. The ruling on a demurrer to the evidence is a decision occurring on the trial; and, in order to enable the Supreme Court to review such ruling, it is necessary that a motion for a new trial be filed within the time prescribed by law.

(Syllabus by the Court.)

Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Proceedings by the State against D. W. Poor. From a judgment for defendant upon a demurrer to the evidence, the state brings error. Dismissed.

C. P. Holt, Co. Atty., for the State.

F. H. Riley, Geo. Jenkins, and *William Beatty,* for defendant in error.

HAYES, J. This proceeding in error is brought to reverse a judgment rendered upon a demurrer to the evidence, and the errors complained of consist only of errors alleged to have occurred at the trial. Under this condition of the record, nothing is presented to this court by the petition in error that can be considered; and upon the authority of *James v. Jackson et al.,* 30 Okla. 190, 120 Pac. 288, *Stump v. Porter et al.,* 31 Okla. 157,

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120 Pac. 639, and *State of Oklahoma v. Adams,* 31 Okla. 775, 123 Pac. 1127, the cause must be dismissed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

ANDERSON *et al.* v. McMAHON *et al.*

No. 3768. Opinion Filed July 23, 1912.

(125 Pac. 455.)

APPEAL AND ERROR—Time for Taking Proceedings—Service of Summons. A petition in error will be dismissed on motion, even though the same is filed in this court within the year allowed under the statute, where no waiver of issuance and service of summons is had, and no praecipe for same filed, and no summons is issued or general appearance made within such time.

(Syllabus by the Court.)

Error from Jackson County Court;
B. N. Woodson, Judge.

Action between Neil P. Anderson and others and B. W. McMahan and others. From the judgment, Anderson and others bring error. Writ of error dismissed.

E. E. Gore, for plaintiffs in error.

P. K. Morrill and *T. M. Robinson,* for defendants in error.

HAYES, J. The judgment from which this proceeding in error is prosecuted was rendered by the trial court on the 25th day of February, 1911, and the motion for a new trial was overruled on the 5th day of April, 1911. The petition in error and case-made were filed in this court on the 3d day of April, 1912, but no praecipe for summons in error was filed, no summons in error issued, and no entry of general appearance of defendants in error was made before the expiration of one year from the order overruling the motion for a new trial. No summons in error has ever been issued or served. On the 8th day of April,

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1912, there was filed in this court a waiver of issuance and service of summons in error, signed by defendants in error. Under numerous decisions by this court that a petition in error will be dismissed, although filed within the year allowed by statute, if summons is not issued or waived, or a praecipe filed therefor, or general appearance made by the defendant in error within one year, this proceeding in error must be dismissed for want of jurisdiction. *Hudson v. Lapsley et al.*, 29 Okla. 681, 119 Pac. 125; *Manes v. Hoss*, 28 Okla. 489, 114 Pac. 698; *Coleman v. Eaton*, 26 Okla. 858, 110 Pac. 672; *Watson v. Rein et al.*, 26 Okla. 47, 108 Pac. 397; *Court of Honor v. Wallace et al.*, 23 Okla. 734, 102 Pac. 111. After the year allowed by statute for commencement of the proceeding in error in this court expires, parties cannot by agreement confer jurisdiction upon the court.

The motion to dismiss is sustained.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

GULF, C. & S. F. RY. CO. v. STATE.

No. 3269. Opinion Filed July 23, 1912.

(125 Pac. 1103.)

1. **RAILROADS—Regulation—Orders of Corporation Commission—Review.** On appeal from an order assessing a penalty under section 19, art. 9, Williams' Ann. Const., Okla., against a railway company for an alleged violation of an order of the Corporation Commission, the Supreme Court has jurisdiction to pass upon the power of the Commission to make the order violated, and whether it is reasonable and just, notwithstanding such an order is not appealable when made.

2. **SAME—Interference With Interstate Commerce—Statutory Provisions.** Order No. 148 of the Corporation Commission is not violative of the commerce clause of the federal Constitution, and was not superseded by the act of Congress of May 6, 1910, c. 208, 36 St. at L. 350 (U. S. Comp. St. Supp. 1911, p. 1329).

3. **SAME—Orders of Corporation Commission.** As construed by the Corporation Commission, it cannot be said that Order No. 148 is unreasonable or unjust.

(Syllabus by the Court.)

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Appeal from the State Corporation Commission.

Appeal by the Gulf, Colorado & Santa Fe Railway Company from an order of the Corporation Commission. Modified and affirmed on rehearing.

Cottingham & Bledsoe, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for the State.

KANE, J. This is an appeal from an order of the Corporation Commission imposing a fine of $500 on the appellant for failing "to make report to Corporation Commission in time specified on derailment of passenger train," in violation of Order No. 148 of the Commission, which requires all railway companies operating within the state, upon the happening of an accident, to at once telegraph to the Commission the following information in the following class of accidents: All accidents resulting in loss of life or limb or serious injury to passengers or employees. The telegraph report shall show the date, time, and place of accident, the train or trains involved, the number of passengers killed or injured, if any.

The accident, which was not reported within the time prescribed in the order, was the derailment of a passenger train at a bridge on the Washita river on appellant's line of railway, which occurred on the 14th of December, 1910. The passenger train left the track and plunged into the river, killing one and injuring about forty passengers. It appears that the appellant is an interstate railway and that the train was an interstate train, engaged in interstate as well as intrastate traffic.

Appeals from Order No. 148 were taken to this court by several railway companies, which were dismissed upon the ground that the court is without jurisdiction to review such order. *St. L. & S. F. R. Co. v. State et al.,* 24 Okla. 805, 105 Pac. 351; *A., T. & S. F. Ry. Co. v. State,* 24 Okla. 807, 105 Pac. 352. It is now contended by the Attorney General that, "this court having twice declined to review the Commission's general Order No. 148, on appeals attempted for that express purpose, holding that it had

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no jurisdiction to do so (24 Okla. 805, 807, 105 Pac. 351 and 352), we assume that the same will not be inquired into in the present proceeding, except for the purpose of determining the Commission's power to make the same; it being jurisdictional as to Order No. 466, herein appealed from, predicated thereon."

As the Corporation Commission is only empowered by the Constitution to enforce compliance with its lawful orders by adjudging fines or penalties against the delinquent or offending parties or companies, after a hearing wherein an opportunity is afforded to introduce evidence and be heard, "as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation" (Constitution, sec. 19, art. 9, Williams' Ann. Const., Okla.), this court must have jurisdiction to pass upon the power of the Commission to make the order violated, and whether it is reasonable and just when cases of this class come before it on appeal. *A., T. & S. F. Ry. Co. v. State,* 26 Okla. 166, 109 Pac. 218.

The grounds upon which the appellant seeks a reversal may be briefly stated as follows: (1) Order No. 148, in so far as it relates to common carriers engaged in interstate commerce, covers the same subject-matter embraced within certain sections of the act of Congress of May 6, 1910, c. 208, 36 St. at L. 350 (U. S. Comp. St. Supp. 1911, p. 1329), entitled "An act requiring common carriers engaged in interstate and foreign commerce to make full reports of all accidents to the Interstate Commerce Commission, and authorizing investigations thereof by said Commission," and is therefore superseded by the federal act. (2) Order No. 148 is unreasonable and unjust, because "the urgency of the higher duty of looking after and caring for the injured and the dead, and clearing the track, so as to permit the resumption of transportation" renders it practically impossible for a report to be made upon the spur of the moment covering with any degree of accuracy the matters inquired about. (3) The Commission erred in adjudging the defendant guilty of a violation of Order No. 148, because it appears conclusively from the evidence that it had no intention to violate same, but there was an honest

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endeavor on behalf of the railway company to comply with the same. And it further appears that as quick as the attention of the officers was called to the fact that officers are required to report by wire the report was promptly made.

In a former opinion, the first contention of the appellant was sustained, upon the supposition that the act of Congress of March 3, 1901, c. 886, 31 St. at L. 1446 (U. S. Comp. St. 1901, p. 3176), was still in force. Counsel for appellant cited that act as controlling, and our attention was not called to its repeal and the enactment of the act of May 6, *supra*, until the petition for rehearing was filed; whereupon counsel for appellant voluntarily corrected the error, but still insist that under either act their first contention is well taken. We cannot agree with counsel. The latter act, while entitled practically the same as the former, differs from it in several important particulars. Both acts require common carriers engaged in interstate commerce by railroad to make to the Interstate Commerce Commission a monthly report of all collisions and derailments of trains, and of all accidents which may occur to its passengers or employees, and empower the Commission to investigate such collisions, derailments, or accidents; but section 3 of the latter acts also provides "that when such accident is investigated by a commission of the state in which it occurred the Interstate Commerce Commission shall, if convenient, make any investigation it may have previously determined upon, at the same time as, and in connection with, the state commission investigation."

Counsel for appellant argue that, while in the section that deals with investigations the concurrent right of the state to make such investigations is recognized, no such recognition is found in the part relating to the reporting of accidents; therefore the rule, that if the state and Congress have concurrent power that of the state is superseded when the power of Congress is exercised, applies, because Order No. 148 provides for reporting, and not investigating, accidents. We think the power to investigate accidents includes the power to require reports concerning them. Before there can be an investigation, there must be information from some source that an accident has occurred. The

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most natural way to secure this information is to require the officers of the carrier, who have it at first hand, to supply it. In many cases, no doubt, no investigation would follow; the nature of the report disclosing that it was not necessary. It is the duty of the state to establish such reasonable regulations as are necessary for the safety of all engaged in business or domiciled within its borders. Passengers and employees on interstate trains, while within the state, belong to that class. *C., R. I. & P. Ry. Co. v. Arkansas,* 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 57 L. Ed. ——, involved the power of the Interstate Commerce Commission to prescribe a uniform system of bookkeeping and require annual reports from common carriers upon the Great Lakes, both as to their interstate and intrastate business. The Commerce Court limited the enforcement of the order of the Commission to interstate traffic. The Supreme Court held that the right to prescribe a system of bookkeeping and require reports by the Commission extended to the intrastate business of the carrier, upon the ground that the prescribing of bookkeeping and the exacting of reports as to intrastate matters "was not to enable it [the Interstate Commerce Commission] to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction." The order herein involved is in the nature of a local regulation for caring for the safety of the employees and passengers of all common carriers while within the state, and is not in any proper sense an attempt to regulate interstate commerce.

On the whole, we are of the opinion that Order No. 148 of the Corporation Commission is not violative of the commerce clause of the federal Constitution, and was not superseded by the act of Congress of May 6, 1910, c. 208, 36 St. at L. 350 (U. S. Comp. St. Supp. 1911, p. 1329).

As construed by the Corporation Commission, it cannot be said that Order No. 148 is unreasonable or unjust. Mr. E. C. Patton, connected with the legal department of the Commission,

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who, no doubt, speaks with authority, has filed a brief herein, wherein he states that when Order No. 148 was made the Commission had before it the rules and regulations of the carriers by rail of the state, requiring trainmen, immediately on the happening of an accident, to report the same by wire to some of the general officers of the company, usually the superintendent or general superintendent. That "the order of the Commission is made in view and with an understanding of the rules and regulations in force by the railroad companies, and no conductor or other employee is required by this order to leave his duties in caring for the train, but this report is made upon receipt of the same by the general officers of the company, who alone can, in the line of their employment, make reports that would bind the company. The Commission has never penalized any road for failure to comply with this order, when the same was made within twelve hours after the happening of the accident. In what time the railroads shall make this report depends upon the circumstances in each case. It is absolutely necessary, in order to continue the operation of the road, for a telegraphic report to be made by trainmen to the superior officers at the earliest possible moment. It is necessary that same be made so that wrecking crews may be sent out, if necessary. Hence the order of the Commission was promulgated so as to be complied with in connection with the already established rules and duties of the carriers. The only additional duty the carriers must perform in complying with this order is for the general superintendent or division superintendent, as the case may be, when he receives the telegraphic report, to repeat the same, or such parts thereof as may be necessary, to the Commission. This has been done repeatedly. Mr. Beacon, general superintendent of the Rock Island at El Reno, reports accidents for the Rock Island; the division or general superintendent of the Frisco does likewise; the division superintendent or general manager of the Santa Fe does likewise; the reports for the Gulf, Colorado & Santa Fe Railway are made from Galveston, or such point as Mr. Pettibone, general manager, may be. Some roads at times permit the dispatcher to repeat the message to the Commission which he receives from

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the scene of the accident. Hence the report is made to the Commission with less inconvenience or expense than most any other report required."

It is obvious that, thus construed, Order No. 148 does not interfere with what counsel term "the higher duty of looking after and caring for the injured and the dead, and clearing the track, so as to permit the resumption of transportation."

In the briefs and argument of counsel for the respective sides, the remaining question, Is the evidence sufficient to support the order appealed from? is practically abandoned; it being stated in open court by the Attorney General, and concurred in by counsel for appellant, that if the jurisdictional question were decided in favor of the appellee the fine may be assessed at one dollar. We think the state of the record justifies this agreement, and we therefore affirm the order appealed from in all particulars, except that the penalty assessed shall be one dollar, in conformity with stipulation of counsel, instead of the sum assessed by the Corporation Commission.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

STATE *ex rel.* CALDWELL v. VAUGHN *et al.*

No. 4207. Opinion Filed July 30, 1912.

(125 Pac. 899.)

1. **PROHIBITION—Jurisdiction.** The district and superior courts of the state have power to issue writs of prohibition to inferior courts and bodies exercising judicial power to restrain them from exercising powers not granted to them.

2. **SAME—Nature of Remedy—Ministerial Functions.** The writ of prohibition will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function.

3. **SAME—Judicial Powers—Primary Elections—Duties of Officers.** A county election board, in placing upon the ballots for a primary election the names of candidates for nomination by the dif-

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ferent political parties for the different officers to be elected by the county, is engaged in the performance of a ministerial duty and does not exercise judicial power.

(Syllabus by the Court.)

Error from Superior Court, Custer County; J. W. Lawter, Judge.

Proceedings by the State, on the relation of Cliff Caldwell, for writ of prohibition to C. E. Vaughn and others, as the County Election Board of Custer County. From a judgment sustaining a demurrer to the petition, the relator brings error. Affirmed.

Geo. T. Webster and *A. J. Welch,* for plaintiff in error.

Charles West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for defendants in error.

HAYES, J. Plaintiff in error brought this action in the superior court of Custer county to obtain a writ of prohibition against the election board of that county to restrain it from placing the names of proposed candidates upon the primary election ballot for the office of clerk of the superior court of Custer county, and to prohibit said board from placing upon the general election ballots the names of any candidate or nominee for said office. Those who have applied to the election board to have their names placed upon the ballots at the primary to be held on the ——— day of August, 1912, as candidates for nominees of the respective parties, have been made parties defendant. Plaintiff in error, relator below, brings the action in the name of the state on his own behalf, after having requested the Attorney General and the county attorney, respectively, to bring said action, and they had refused to do so. Relator is the present clerk of the superior court of Custer county. He was duly elected to that office in November, 1910, and is now in the active discharge of his duties. He contends that by chapter 47, Sess. Laws 1910, the term of his office is fixed for four years from the second Monday in January, 1911; that said office is a state office; that the foregoing statute was not amended by section 19, c. 69, of the Session Laws of 1910; and that no statute has subsequently been passed

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making said office a county or district office or changing the term thereof. Respondents filed a demurrer to relator's petition, which was sustained by the trial court, and it is from the judgment of that court sustaining the demurrer and dismissing plaintiff's petition that this proceeding in error is prosecuted.

Of the questions presented in counsel's brief, the only two that need be considered are: First, has the superior court jurisdiction to issue writs of prohibition for any other purpose than to carry into effect its orders, judgments, or decrees; and, second, will the writ of prohibition lie to an election board to prohibit it from placing the names of candidates for nominees of the respective parties for any office upon the ballot to be used at a primary election? The general act providing for the establishment of superior courts in certain counties of the state provides that such courts shall exercise concurrent jurisdiction with the district courts (section 2, art. 7, c. 14, Sess. Laws 1909), and the act creating the superior court of Custer county provides that it shall have and exercise the same jurisdiction as is provided by law for other superior courts of the state (section 1, c. 47, Sess. Laws 1910). Section 10, art. 7, Williams' Ann. Const., Okla., in part provides:

"The district courts, or any judge thereof, shall have power to issue writs of *habeas corpus,* mandamus, injunction *quo warranto, certiorari,* prohibition, and other writs, remedial or otherwise, *necessary or proper to carry into effect their orders, judgments, or decrees.*" (Italics are ours.)

It is insisted by respondents that the italicized phrase of the foregoing excerpt limits the power granted to district courts to issue writs of prohibition to the issuance of same only when they are necessary and proper to carry into effect the orders and judgments of such courts. This construction, we think, is untenable. If this phrase limits the power granted to the courts to issue writs of prohibition, it also limits the power granted to issue writs of mandamus, injunction, and writs of *habeas corpus.* That the district courts of the state have power to issue these last-named writs in independent actions has been universally recognized by the courts and by the bar of the state. What was intended by

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this provision of the Constitution was to confer upon said courts and the judges thereof the power to issue certain specifically named writs; and, in addition thereto, such other writs, remedial or otherwise, as might be necessary or proper to carry into effect the orders, judgments, and decrees of such courts. The phrase italicized by us was intended to limit only the purpose for which "other writs, remedial or otherwise," may be issued, and not the specifically named writs in the first phrase of the sentence; and the district courts of the state have power to issue writs of prohibition to inferior courts or tribunals exercising judicial power to restrain them from exercising powers not granted to them.

The function of the writ of prohibition as it existed at common law had not, prior to the adoption of the Constitution, been enlarged by statutory enactment; nor has it been so enlarged since. In conferring upon the district court power to issue this writ, it was intended to authorize the writ as it existed at common law. *Baker v. Newton et al.*, 22 Okla. 658, 98 Pac. 931.

"At the common law the writ of prohibition was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but to the cognizance of some other court. 3 Shars. Blackst. Com. 112. It was an original remedial writ provided as a remedy for encroachment of jurisdiction; its office was to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction." (*Spring Valley W. W. v. S. F.*, 52 Cal. 111.)

Discussing the purpose of the writ, it is said at paragraph 1722, Spelling on Injunctions and Other Extraordinary Remedies:

"Courts almost universally preserve the original common-law features of the writ of prohibition, and confine its use to the prevention of usurpation or excess of jurisdiction by courts and bodies possessing, for certain purposes and in certain instances, quasi judicial powers."

The statute makes it the duty of the secretary of the state election board to transmit to the secretary of each county election board a notice in writing, designating the offices to which candidates are to be nominated at the primary election, and, upon

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receipt of that notice, the secretary of the county election board is required to give written notice to the inspectors of the election in the various precincts in which he shall state the names of all offices for which nominees are by law to be chosen at such precincts; and it is made the duty of the precinct election inspectors, upon receiving such notice from the secretary of the county election board, to post a notice in three places in the precinct in which he shall give the names of all county or township offices for which the several political parties shall nominate candidates. The person desiring to become a candidate before any such primary election for a political party nominee shall petition the proper official to have his name printed upon the ticket of the political party whose nomination he seeks. All nominating petitions for county and township offices are required to be filed with the secretary of the county election board. Sections 3278-3280, Comp. Laws 1909. The officers charged with giving notice of what officers will be elected at the coming election and of receiving applications for nominees for such offices have construed the statute as requiring the election of the clerk of the superior court; and the county election board, respondent herein, is proceeding to place upon the ballot for the primary election the names of those who have petitioned it for such purpose. The matter of placing the names upon the ballots for these various offices is a purely ministerial duty, and involves the exercise of no judicial power. If the election board be mistaken in the requirement of the statute as to the election of the clerk of the superior court, its act binds no one; it can render no judgment; and the placing of the names upon the primary ballot, and later of the nominees of the respective parties upon the general election ballot, cannot in any way deprive relator of his office, if his term of office is for four years, instead of two years, and does not expire until January, 1915, instead of January, 1913. A certificate of election to any candidate prevailing at the general election will not have the effect to oust relator from office, for the election board is not vested with any judicial power to determine the rights between parties.

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In *Montgomery v. State Election Board et al.*, 27 Okla. 324, 111 Pac. 447, plaintiff sought a writ of *certiorari* to the state election board and to one of the county election boards of the state, directing them to certify to this court a record of all proceedings had by said boards with reference to the resignation of a member of the county election board and the appointment of his successor. In denying the writ, this court said:

"This board is a part of the executive department of the state, charged with the duty of the execution of all laws in force in the state relating to the holding of elections. It can exercise neither legislative nor judicial functions except as the same are merely incidental to the administration of its duties as a board of the executive department. It is not such a board or commission as judicial power may be vested in pursuant to article 7, sec. 1, of the Constitution. * * *"

In *People v. Election Commissioners*, 54 Cal. 404, relator charged that the board of election commissioners had, without authority of law, called an election for the purpose of electing freeholders to prepare and propose a city charter, and he sought a writ of prohibition to restrain them from holding the election; but the court held that the acts sought to be restrained in no manner constituted the exercise of judicial power, and that, whether they were legislative or simply ministerial, a writ of prohibition would not lie to restrain them. The foregoing case, we think, is in point here, and is in harmony with the well-settled doctrine of the courts that ministerial and executive functions cannot be controlled or regulated by prohibition. *State ex rel. v. Hawkins*, 130 Mo. App. 41, 109 S. W. 77; *La Croix v. County Commissioners of Fairfield County*, 49 Conn. 591; 32 Cyc. p. 602.

In receiving applications of candidates to have their names placed upon the primary ballots and in placing the same thereon, the county election board is engaged in a purely ministerial duty, and in the exercise of a ministerial or executive power; and if it makes mistakes in the exercise of this power, by placing the names of persons on the ballot as candidates for an office for which no election under the law can be held, it does not exercise or assume any judicial power by such act; and it cannot be restrained by a writ of prohibition.

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It follows from this conclusion that the judgment of the trial court sustaining the demurrer should be sustained.

WILLIAMS and KANE, JJ., concur; TURNER, C. J., and DUNN, J., absent, and not participating.

BOARD OF COM'RS OF GARFIELD COUNTY v. WORRELL.

No. 3747. Opinion Filed August 20, 1912.

(126 Pac. 785.)

SCHOOLS AND SCHOOL DISTRICTS—Officers—County Superintendent—Review of Decisions. By virtue of section 1, c. 107, p. 202, Sess. Laws 1910, and section 8 of article 1, c. 33, Sess. Laws 1905 (section 8176, Comp. Laws 1909), a county superintendent is granted the power to change consolidated school districts in his county when the interests of the people thereof may require it by making them to conform to existing topographical or physical conditions.

(a) An appeal lies from the action of such county superintendent to the board of county commissioners.

(Syllabus by the Court.)

Error from Superior Court, Garfield County; Dan Huett, Judge.

Application by L. F. Worrell for writ of prohibition to the board of county commissioners of Garfield county. From a certificate granting the writ, the commissioners bring error. Reversed.

C. N. Harmon and *Garber & Kruse,* for plaintiff in error.

H. J. Sturgis and *McKeever & Walker,* for defendant in error.

WILLIAMS, J. Act March 10, 1905 (Sess. Laws 1905, c. 33, art. 1, pp. 358, 362), provides for the formation of consolidated school districts by the voluntary disorganization and consolidation of adjacent school districts, the establishment of consolidated schools in which certain branches shall be taught, the

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transportation of pupils to and from school, and the disposition of the property and indebtedness of the said disorganized districts. The act was amended by act of the first Legislature of the state. Sess. Laws 1907-08, p. 670; section 8169, Comp. Laws 1909. Section 8 of said act (chapter 33, art. 1, Sess. Laws 1905; section 8176, Comp. Laws 1909) provides:

"In all matters relating to consolidated school districts, not provided for in this act, the law relating to school districts shall be in force where said laws are applicable."

In May, 1911, the county superintendent of Garfield county declared school districts numbered 1, 2, 23, and 24 in said county disorganized, and formed consolidated district No. 2 out of said disorganized districts. On July 10, 1911, a petition signed by 106 qualified electors of said consolidated district, the same being a majority of the electors of said district, was filed with the county superintendent of said county, requesting that the boundaries of said consolidated district be changed so as to form four school districts whose territory should conform to what was formerly school districts numbered 1, 2, 23, and 24. The required preliminary notice was also given. On August 1, 1911, a hearing on said petition being had, the county superintendent refused to grant the same. Within the time prescribed and required by law, notice of appeal from the action of the county superintendent to the board of county commissioners of said county was served, and said appeal was in all respects perfected. On August 8, 1911, whilst said county commissioners were proceeding to hear and determine said appeal, a preliminary order prohibiting said board from acting in the premises or assuming jurisdiction of said appeal, having been issued out of the superior court of said county, was served upon said board and the further hearing of said appeal was discontinued. On January 23, 1911, the proceedings out of which said preliminary writ of prohibition was issued from the superior court were dismissed. On February 9, 1912, the board of county commissioners was again proceeding to hear and determine said appeal, when a second preliminary order of prohibition, issued out of said superior court, was served upon said

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board. On March 16, 1912, said preliminary writ of prohibition was made permanent.

In *Felkner v. Winningham et al., ante,* 122 Pac. 534, this court held that, where there was no specific provision relating to consolidated school districts, provisions relating to school districts should apply where not inapplicable, and that section 8080, Comp. Laws 1909, which relates to the formation of school districts lying partly in two or more counties, by said section 8176, *supra,* applied to cases for the formation of consolidated school districts where such districts proposed to be consolidated lay in two or more counties. Section 8050, Comp. Laws 1909 (section 5767, St. Okla. 1893, as amended by act of the Legislature of Oklahoma Territory [Laws 1895, p. 240], provides that if in the formation or alteration of or refusal to form or alter school districts, any person or persons shall feel aggrieved, such person or persons may appeal to the board of county commissioners. An identical statute was construed by the Supreme Court of Kansas in *Jeffreys, County Superintendent, v. School Dist. No. 54 in Bourbon County,* 3 Kan. App. 154, 42 Pac. 830, where it was held that an appeal in an action from the decision of the county superintendent to the board of county commissioners would lie. In *School District No. 17 of Garfield County et al. v. Zediker et al.,* 4 Okla. 599, 47 Pac. 482, such statute was sustained, and it was held that such power might be exercised by the county superintendent. See, also, *School Dist. v. Turner,* 13 Okla. 71, 73 Pac. 952; *Stewart v. Adams,* 50 Kan. 560, 32 Pac. 122; *Kellogg v. School Dist.,* 13 Okla. 285, 74 Pac. 110; *Bourland v. Snyder,* 224 Ill. 478, 79 N. E. 568.

Section 8171 provides for the officers of a consolidated school district board, to wit, director, clerk, and treasurer. Section 8172 prescribes that the powers and duties of such board in such consolidated district shall be the same as those provided by law for school district boards and their several officers. Section 8175 provides:

"The annual meeting of said consolidated district shall be held on the same date as fixed by law for holding the annual school meetings of each year at the schoolhouse belonging to

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said district, at 2 o'clock p. m., and they shall have such powers and duties as are by law provided for annual school district meetings."

Section 1, c. 107, Sess. Laws 1910, amending the act of 1897 (Laws 1897, c. 34, art. 5, sec. 1), clearly vests the authority in the county superintendent to divide the county into a convenient number of school districts and to change such districts when the interests of the people may require it by making them to conform to the existing topographical and physical conditions, with the proviso that no district shall be changed under said act except upon petition to the county superintendent signed by at least one-third of the qualified electors of any district desired to be changed, and with the further proviso that one-fourth of the qualified electors of any district affected by such change may join in an appeal to the board of county commissioners from the action of the county superintendent; and with the further proviso that such appeal shall be heard by a majority of the members of the board of county commissioners at their next regular meeting. The case of *Board of Education of the City of Pond Creek v. Boyer,* 5 Okla. 225, 47 Pac. 1090, is not against the conclusion herein reached, as that applies only to separate school districts of cities of the first class, and rests upon the wording of the statute. In order for the county superintendent to be authorized to change the consolidated district as petitioned, such authority must have been granted to him by some act of the Legislature.

Section 8176, *supra,* having provided that in all matters relating to consolidated school districts not otherwise provided by law the law relating to school districts shall be in force where such laws are applicable, the question arises as to whether this does not make such grant of power in cases of consolidated districts to the county superintendent. Sections 8169 and 8170, Comp. Laws 1909, provide for the formation of consolidated school districts, but contain no provision for the changing of such districts. Section 1 of chapter 107, *supra* (Act of March 26, 1910), provides for the formation of school districts in a county, and further provides for the changing of said districts when the interests of the people may require it. That part of said section

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that provides for dividing the county into a convenient number of school districts is inapplicable to consolidated school districts for sections 8169 and 8170, *supra,* contain specific provision as to the formation of consolidated school districts. No specific provision having been enacted by the Legislature relative to the changing of said districts, that portion of section 1 of the act of March 26, 1910, *supra,* providing for the changing of such districts, appears to be applicable, and under the same application as was made in *Felkner v. Winningham, supra,* the county superintendent has the authority to change such consolidated school district, with the limitations as are provided by law. See, also, *Newton v. Independent School District of Montrose,* 109 Iowa, 671, 80 N. W. 316; *Union v. Ind. School Dist. of Cedar Rapids,* 62 Iowa, 616, 17 N. W. 895; *Easton v. Douglas,* 55 Iowa, 390, 7 N. W. 643.

The question as to whether prohibition was an available remedy is not passed on, neither party raising same, nor is it essential to do so in order to dispose of this case. It follows, also, that the procedure therein provided would also apply, and that an appeal would lie to the board of county commissioners, and that it was error to issue the writ of prohibition.

TURNER, C. J., and HAYES and KANE, JJ., concur; DUNN, J., absent, and not participating.

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CITY OF LAWTON v. WEST.

No. 4247. Opinion Filed August 30, 1912.

(126 Pac. 574.)

MUNICIPAL CORPORATIONS — Bonds—Issuance—Approval—"Public Securities or Bonds." Bonds issued by a municipal corporation in pursuance of an act of the Legislature, approved April 17, 1908 (Laws 1907-08, c. 10, art. 1), the provisions of which are to be found in article 5, c. 14, Comp. Laws 1909, to raise revenue or funds with which to make street improvements in a city, which are to be paid by special assessments levied against the property benefited by the improvements, are not "public securities or bonds," within the meaning of section 2 of an act of the Legislature, approved March 24, 1910 (Laws 1910, c. 94), entitled "An act for the protection, validation and sale of bond issues of the state, counties, townships and municipalities and all other political organizations and subdivisions of the state of Oklahoma"; and such bonds are not required to be examined and certified to by the Attorney General as **ex-officio** bond commissioner.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Application by the City of Lawton for mandamus to Chas. West. *ex-officio* Bond Commissioner. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. C. Black, for plaintiff in error.

Chas. West, Atty. Gen., and *R. E. Gish,* for defendant in error.

HAYES, J. This is an appeal from a judgment of the district court of Oklahoma county, denying an application of plaintiff in error for a writ of mandamus to the Attorney General to require him to pass upon an issue of improvement bonds, issued by plaintiff in error, commonly referred to and known as paving script or bonds. The bonds were issued by the authorities of the city under the provisions of an act of the Legislature, approved April 17, 1908, to be found in article 5, c. 14, Comp.

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Laws 1909. The bonds were issued for the purpose of procuring the necessary means to pay the cost of expenses of improving certain streets in the city of Lawton. They recite, upon their face, that they are payable solely from assessments which have been legally levied upon the lots and tracts of land benefited by the proposed improvements, and that the city of Lawton agrees to collect, as by law provided, the assessments so made, and irrevocably pledges the faith, credit, and revenues of the city for the purpose of carrying out such stipulation.

The statute under which the bonds were issued also provides that they shall in no event become a liability of the city. Section 726, Comp. Laws 1909. By an act of the Legislature, approved March 24, 1910 (chapter 94, Sess. Laws 1910), the Attorney General is made *ex-officio* bond commissioner of the state. Section 2 of that act is as follows:

"It shall be the duty of such bond commissioner to prepare uniform forms and prescribe a method of procedure under the laws of the state in all cases where it is desired to issue public securities or bonds, in any county, township, municipality, or political or other subdivisions thereof of the state of Oklahoma; and it shall be the further duty of said bond commissioner to examine into and pass upon any security so issued, and such security, when declared by the certificate of said bond commissioner to be issued in accordance with the forms of procedure so provided, shall be incontestable in any court in the state of Oklahoma unless suit thereon shall be brought in a court having jurisdiction of the same within thirty days from the date of the approval of said securities by the bond commissioner."

The act also makes all bonds issued by any political or municipal subdivision of the state without the certificate of the bond commissioner invalid.

The Attorney General refuses to examine into and pass upon the bonds and securities here involved, because he construes the language of the statute requiring him to examine into and pass upon any securities issued by a county, township, or a municipality as not including bonds or securities issued which are to be paid by special assessments against property benefited by the improvements made with the funds procured from the securities. The language of the statute imposes upon the bond commissioner

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certain duties, "where it is desired to issue public securities or bonds in any county," etc. It is not sought by this proceeding to require the Attorney General, as bond commissioner, either to approve or disapprove the bonds involved, but to require him to examine into them and pass upon their validity. The effect of the writ sought, therefore, is not to control the Attorney General in the exercise of any judicial discretion he might be required to exercise in determining the validity of the bonds, but to act. Whether such duty devolves upon him under the statute depends upon whether the terms "public securities" or "bonds" used in the statute include securities issued by incorporated cities and towns under the provisions of the foregoing mentioned act of 1908, providing for the issuance of bonds for street improvement purposes. The terms "public securities" or "bonds" are used in the act, we think, synonymously; for section 2, after making it the duty of the bond commissioner to prescribe a method of procedure to be followed when it is desired to issue "public securities" or "bonds," thereafter throughout that section uses the word "securities" alone to include both bonds and securities; and in section 3 the term "bonds" is used for the evident purpose of including all securities referred to in the preceding section. "Public securities" is defined in 32 Cyc. p. 1253, to be:

"A certificate or instrument issued by the proper officer under the authority of law, evidencing a pecuniary indebtedness or liability of the government to the holder."

This definition we believe to be sound, and it is supported by the authorities cited in the text. Tested by this definition, the bonds involved in this case are not public securities; for while they are issued by certain authorized officers of a municipal government under authority of law, they do not evidence an indebtment or liability of the municipal government, so provided both by the bonds themselves and the statute under which they are issued. Under the provisions of the statute, no part of the taxpaying public constituting the municipal corporation is liable jointly for the indebtedness represented by these bonds. They are to be paid by special assessments, levied by ordinance against specific pieces of property; and no piece of property is liable for

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the whole indebtedness, but only for that assessed against it in accordance with the provisions of the statute. A personal judgment against the city for the nonpayment of these bonds could not be obtained; nor can they be enforced against its general assets, or resort be had to general taxation for the purpose of raising a revenue to satisfy them. Section 198, Dillon on Municipal Corporations.

The municipal corporation acts only as an intermediary or agent for the property holders whose property these public improvements benefit in arranging for the improvements, making the contracts, negotiating the bonds, and collecting the revenues from the party benefited and disbursing it to the holders of the securities. The bonds and securities contemplated by the statute imposing the duty upon the bond commissioner are not such bonds and securities as constitute a liability upon the general taxpaying public. In connection with this construction of the statute, which we think from the terms used therein, independent of any other consideration, is correct, it should be suggested that such has been the construction and meaning of the statute uniformly given to it by the bond commissioner since its enactment, and generally acquiesced in by the municipal authorities, the general public, and the bond investors throughout the state; and large investments and improvements have been made upon this construction. Since by section 3 of the act all bonds so issued would be rendered invalid if such construction is not correct, although this court is not bound by the construction of the bond commissioner acquiesced therein by the public for so short a time, it would be a fact worthy of consideration, even if the terms of the act were more doubtful in their meaning than they are.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, J., concur; KANE and DUNN, JJ., absent, and not participating.

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WEST & RUSSELL v. RAWDEN *et ux.*

No. 891. Opinion Filed January 9, 1912.

Rehearing Denied August 28, 1912.

1. **PLEADING—Amendments—Discretion of Trial Court.** Where an amended petition does not change substantially the original claim of the plaintiff it is not error for the trial court to allow it to be filed.

2. **APPEAL AND ERROR—Review—Instructions—Harmless Error.** Where it is apparent that an instruction given could not prejudice the rights of the losing party upon the theory his case was tried below, the same will not be held to be reversible error, although the instruction given may not have been technically correct.

3. **ACTIONS—Grounds and Conditions Precedent.** Where the evidence reasonably tended to show that the plaintiff returned to the defendants all the papers they received from them in relation to the sale of patent-right territory, and disclaimed any further interest therein, long prior to the commencement of an action wherein the sale of said territory incidentally came into question, and that the enterprise had long been abandoned by all the parties to the transaction on account of defects in the patented article which made its sale impracticable, a more formal reconveyance of such territory was not necessary before the commencement of said action.

4. **DEEDS—Nature and Extent of Interest or Estate Conveyed.** It is a presumption of law that one conveying by a general warranty deed holds the original grant.

5. **WITNESSES—Husband and Wife—Joint Interest—Competency.** Section 5842, Comp. Laws 1909, provides that: "The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action."

6. **ACTIONS—Husband and Wife—Joint Parties—Witnesses.** The wife, jointly with her husband, signed certain deeds of warranty, conveying certain lands, which deeds were the evidence introduced tending to show in whom the title to said lands was vested. In a suit for the purchase price and to foreclose a statutory vendor's lien, she joined her husband as party plaintiff, without objection. The defendants prayed for a judgment against husband and wife on their cross-petition for breach of warranty. **Held**, that the husband and wife were joint parties with a joint interest in the action, and that the wife, therefore, was competent to testify therein.

(Syllabus by the Court.)

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Error from District Court, Woodward County; R. H. Loofbourrow, Judge.

Action by J. Rawdon and Maggie T. Rawdon, his wife, against L. D. West and John R. Russell, copartners. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. M. Appelget and *C. W. Herod,* for plaintiffs in error.

Hoover & Swindall, for defendants in error.

KANE, J. This was an action commenced by the defendants in error, plaintiffs below, against the plaintiffs in error, defendants below, to recover the purchase price of a certain piece of real estate, and to enforce the statutory vendor's lien for securing the payment thereof. The original petition alleged, in substance, that on or about the 7th day of September, 1901, the plaintiffs were the owners in fee simple of the land in controversy; that on or about said time they entered into a certain verbal agreement with the defendants whereby it was agreed that the plaintiffs would convey to the defendants an undivided one-half interest to and in said land for a consideration of $2,700, to be paid as follows: West & Russell agreed to sell to the plaintiffs certain counties in the state of Pennsylvania within which they were authorized to dispose of a certain quilting device covered by a patent owned by West & Russell, who were to go with said plaintiffs into said territory and assist them in selling said patent right; that in the event they failed to realize the sum of $2,700 out of the territory, the defendants were to pay the plaintiffs $2,700 in cash for the undivided one-half interest in the land. That later, about the 17th day of October, 1901, they made a contract of like import for the remaining undivided one-half interest in said land for certain quilter territory in the state of Alabama; that it was further agreed in each of said contracts that in the event that West & Russell sold territory in any other state prior to the time that they had paid the defendants in error he full sum of $5,400 for the land in Woodward county, per the ove agreement, then the money derived from the sale of terriry in any other state would be applied upon the agreement be-

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tween them until the consideration was fully paid; that acting upon the agreement, the said plaintiffs executed to the defendants a warranty deed conveying said land; that after the plaintiffs had conveyed said land, the defendants paid a total of $1,147, said payments being made at different dates, after the deeds were executed, up to December, 1903, after which time the defendants refused to make further payments, and after promises at different times to carry out the contract and delaying the plaintiffs by their promises until the 13th day of June, 1905, this action was commenced to recover the balance remaining due and unpaid, amounting to $4,200, with accrued interest. Afterwards, the plaintiffs filed an amended petition, wherein they set up their causes of action in two paragraphs, stating the facts in more detail, and prayed for relief as before. The defendants' answer admitted the contract, the execution of the deeds, etc., as alleged by the plaintiffs, and by way of defense alleged that said quilter territory constituted the sole consideration for the conveyances, and that they were under no obligation to see that the plaintiffs realized any specific sum of money from the sale thereof. The answer further alleged that the defendants were residents of the state of Kansas at the time of the making of each contract, and were such during all the periods during the making thereof, and were at the commencement of this action; that by the laws of the state of Kansas, an action upon a contract not in writing can only be brought within three years from the making thereof; that at the time of the commencement of this action they were and are barred by the statute of limitations of the state of Kansas; that by the laws of the state of Oklahoma and the territory of Oklahoma, at the time of the commencement of this action, it was provided that all causes of action arising in another state between nonresidents of this state, where the cause of action in such other state would be barred by the laws thereof, then no action can be maintained thereon within this state. By way of cross-petition, the defendants alleged a breach of warranty on the part of the plaintiffs in that there were certain incumbrances against the land at the time of the conveyance of same which the defendants were required to pay, and that they were entitled to judgment

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against the plaintiffs for breach of their warranty in the sum of $2,675. The reply of the plaintiffs consisted of a general denial, and an allegation to the effect that defendants agreed with said plaintiffs on the 27th day of October, 1904, in writing to see that the contract which was made between them was carried out to the letter. Upon the issues thus joined the cause was submitted to the jury, which returned a verdict in favor of the plaintiffs for the balance due them, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It is clear that the only issue of fact joined by the pleadings is whether the agreement between the parties was as the plaintiffs alleged it to be, or whether the sale of quilter territory constituted the entire purchase price. The jury resolved that question in favor of the plaintiffs, and as there was evidence reasonably tending to support their verdict, in our examination of the errors complained of we must proceed upon the theory that upon the merits of the case the plaintiffs were entitled to recover. Counsel for plaintiffs in error assign numerous errors, but the following embrace all the grounds for reversal which we deem it necessary to notice in detail: 1. The amended petition stated an entire, new cause of action, and it was therefore error to allow the amendment. 2. The original cause of action is not enforceable, because there was no disaffirmance of the contract by the plaintiffs, within a reasonable time, and the cause of action was barred by the statute of limitations when the action was commenced. 3. Because Maggie T. Rawdon was an incompetent witness in the cause for any purpose, for the reason that she was the wife of the coplaintiff, J. Rawdon.

We do not believe that any of these grounds are well taken. As stated before, in the amended petition, the plaintiffs stated their cause or causes of action in two paragraphs, instead of one as originally, and set out in more detail the facts which constituted the same. There seems to be no material variance between the agreements originally declared on and the ones set up in the amended petition, and the prayer for relief is substantially the same in both pleadings. It is not practicable to lay down a rigid rule in reference to the amendment of pleadings which shall

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govern in all cases. Their allowance must at every stage of the cause rest in the sound discretion of the court and that discretion must depend largely on the special circumstances of each case. The ends of justice should never be sacrificed to mere form or a too rigid adherence to technical rules of practice. *Lookabaugh v. Bowmaker,* 21 Okla. 489, 96 Pac. 651; *Alcorn v. Dennis,* 25 Okla. 135, 105 Pac. 1012; *Kuchler et al. v. Weaver,* 23 Okla. 420, 100 Pac. 915; *Ratliff v. Sommers,* 55 W. Va. 30, 46 S. E. 712. The amendment complained of does not change substantially the original claims of the plaintiffs, and that seems to be the only limitation upon the court below in the matter of allowing amendments.

On the question of the statute of limitations, the court below instructed the jury as follows:

"The court instructs the jury that the defendants in this case have wholly failed to sustain by proper evidence their plea of the statute of limitations set up in their answer, and you are instructed not to consider the same."

This instruction seems to be correct. We have examined the record with considerable care, and fail to find anything to sustain counsel's contention on this point.

Some point is sought to be made by counsel in their brief to the effect that the court erred in instructing the jury that two years was a reasonable time in which the defendants might have performed the alleged contract. It is not clear how such instruction could injure the defendants. If they had alleged in their answer that they had, in good faith, attempted to carry out their contract to sell the quilter territory in Pennsylvania, and could realize the purchase price, but that they had been unavoidably prevented from so doing by want of sufficient time, it is possible that the question of reasonableness of the time of performance should have been submitted to the jury. But their sole defense to the merits of the case was that the sale of the quilter territory constituted the entire consideration for the land, and that they had no further duty to perform toward the plaintiffs in that regard. They tried their case upon that theory and lost.

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and not upon the theory that they had not had a reasonable opportunity to comply with the terms of the contract entered into.

One of the assignments of error is predicated upon the theory that the plaintiffs cannot recover, for the reason that they did not reconvey the quilter territory to defendants before commencing the action. There was evidence reasonably tending to show that the plaintiffs returned all the papers they received from the defendants in relation to the sale of the patent right, and that they are not claiming any title to the quilter territory. But, however that may be, it does not seem to us that the question of rescission arises under the theory upon which the case was tried. The plaintiffs alleged, and the verdict of the jury established the verity of the allegation, that the defendants guaranteed that the plaintiffs would realize the purchase price of the land out of the quilter territory sold to them; that in order to do this the defendants agreed to go with said plaintiffs and assist them in selling said territory, and that they failed to do so. Their defense set up necessarily admits that they not only failed to carry out that part of the contract, but that they also refused to do so, upon the ground that it was not required of them by the terms thereof. Under either theory the sale of the quilter territory was absolute, and there is no apparent reason why it should not remain intact after the consideration for the land was paid, the only effect of the payment being to permit the defendants to leave the plaintiffs upon their own resources for any further profits that might accrue from the sale of quilter territory. It is also disclosed by the evidence, that even with the expert advice and assistance of the defendants, the quilter territory was not a very valuable asset to the plaintiffs, and as the years went by it became less so, until finally the venture was entirely abandoned by all the parties on account of defects in the patented article which made its sale impracticable. So completely had the enterprise dwindled as a money-making proposition at the commencement of this action, it could safely be said there is nothing left to restore.

Section 5842, Comp. Laws 1909, provides that:

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"The following persons shall be incompetent to testify: * * * Husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action."

In the case at bar Mrs. Rawdon signed the deeds which conveyed the land to the defendants, and joined with her husband, as a party plaintiff, to recover the purchase price, and the defendants prayed for a joint judgment against husband and wife in their cross-petition for breach of warranty. As far as the record shows, she had a joint interest in the cause of action, and she certainly is jointly interested with her husband against the cross-petition of the defendants.

"It is a presumption of law that one conveying by a general warranty deed holds the original grant." (13 Cyc. 728.)

There is no evidence in the record other than the deed itself to show in whom the title to the land was vested, and of course, under such circumstances, the presumption would be that the Rawdons owned the land jointly. We think Mrs. Rawdon was clearly within the statutory exception, and therefore competent to testify in the cause.

We have examined the record with considerable care, and are satisfied that the parties had a fair trial before the jury in the court below, and that there was no error committed which would warrant this court in reversing the judgment rendered on the verdict. It is therefore affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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THE

SUPREME COURT,

STATE OF OKLAHOMA

SEPTEMBER TERM, 1912.

PRESENT:

JOHN B. TURNER, CHIEF JUSTICE.
SAMUEL W. HAYES, VICE CHIEF JUSTICE.
R. L. WILLIAMS,
MATTHEW J. KANE, } JUSTICES.
JESSE J. DUNN,

TOWN OF JEFFERSON *et al.* v. HICKS.

No. 47. Opinion Filed September 11, 1912.

(126 Pac. 739.)

1. **APPEAL AND ERROR—Determination and Disposition of Cause—Effect of Death of Parties.** Where, after an appeal is perfected in this court, one of the parties dies before submission of the cause, a judgment rendered after submission of the cause without revivor and without the court's attention being called to the death of the party is not absolutely void, but voidable.

2. **SAME—Vacation of Judgment.** By reason of sections 6094 and 6101, Comp. Laws 1909, made by section 6102 to apply to this court, in so far as their provisions are applicable to its final judgments and orders, this court is authorized, upon proceeding begun within three years after judgment is rendered, to set aside and vacate a judgment for death of one of the parties before judgment.

3. **SAME.** Said statutes confer power upon this court to vacate after the term at which it is rendered a judgment for death of one of the parties before the cause was submitted, but they do not make it mandatory upon the court to do so; and where judgment is

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rendered after death of defendant in error, affirming the judgment of the trial court, the attention of this court never having been called to his death, a motion of the plaintiff in error to vacate, filed approximately one and one-half years after judgment is rendered, will not be sustained, where it does not appear that plaintiff in error's petition states a cause for reversal, or that he was in any way prejudiced by the judgment being rendered without notice to the court of defendant in error's death and without revivor of the action.

(Syllabus by the Court.)

Motion and petition to vacate a judgment of affirmance. Denied.

For former opinion, see 23 Okla. 684, 102 Pac. 79.

Earl Blake, W. A. Ayres, and *Walter A. Blake,* for plaintiffs in error.

F. G. Walling, Harris & Nowlin, and *Kenneth C. Crain, amici curiae.*

HAYES, J. Petition in error in this cause was filed on June 25, 1908. Service of summons in error was made in due time. Plaintiffs in error filed their briefs, and on December 30, 1908, defendant in error filed his brief. On January 29, 1909, counsel stipulated that the cause might be submitted on briefs without oral argument, and the cause was accordingly submitted; and on May 12, 1909, this court rendered its opinion and judgment affirming the judgment of the trial court. *Town of Jefferson et al. v. Hicks,* 23 Okla. 684, 102 Pac. 79, 24 L. R. A. (N. S.) 214. On August 4, 1910, plaintiffs in error filed in this court their petition and motion to vacate the judgment of affirmance rendered by this court, upon the ground that defendant in error had died on December 30, 1908, prior to the submission of the cause, and that no revivor of the action was had before the rendition of said judgment. The fact of defendant in error's death was brought to the knowledge of the court for the first time by this motion. The motion is silent as to whether plaintiffs in error were informed of his death when their counsel stipulated for the submission of the cause upon briefs, or when the judgment for defendant in error was rendered. Nor has any explanation been

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made why this motion was not made until approximately one and one-half years after the judgment it seeks to vacate was rendered.

This proceeding presents to this court the question as to what is the effect of a judgment rendered on appeal in this court, where one of the parties to the appeal dies after the action is begun in this court, but before the submission of the cause and the rendition of judgment. It is the contention of plaintiffs in error that such a judgment is absolutely void. In *Goldsborough v. Hewitt,* 26 Okla. 859, 110 Pac. 906, it was held that the death of a defendant in error after the submission of the cause, but before opinion and judgment therein, did not impair the validity of the judgment; and that, upon the court's attention being called to the death of the party, judgment will be entered *nunc pro tunc* as of the date the cause was submitted. This case was approved and followed in *Boyes et al. v. Masters et al.,* 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576. On the other hand, it has been held that a petition in error filed in this court against a defendant in error who died after judgment in the trial court, but before filing the petition in this court, is a nullity, and jurisdiction of this court cannot be obtained by service of summons in error upon attorney of the deceased (*St. L. & S. F. R. Co. v. Nelson,* 31 Okla. 51, 119 Pac. 625); but the foregoing cases are not decisive of the question here involved. The cases from other jurisdictions directly in point and those in point by analogy are in irreconcilable conflict. The text-writers seem to be unanimous in the assertion that the weight of authority sustains the doctrine that a judgment, although erroneous, is not void because rendered after the death of one of the parties occurring before the submission of trial of the cause where the court had obtained jurisdiction of the subject-matter of the action and of the person of the deceased before his death. Freeman on Judgments, sec. 153; Black on Judgments, sec. 200; 11 Encyc. of Plead. & Prac. p. 843. We have extensively examined the cases, and believe they support the assertion of the text-writers. An interesting collection and discussion of the cases will be found in a note to *Wardrobe v. Leonard,* 126 Am. St. Rep. 619. At com-

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mon law the early rule existing at the time the common law was transplanted into this country was that the death of either party abated an action, and a judgment rendered against a deceased person was void. *Randall's Case,* 2 Mod. 308. This rule was first modified by a statute, which, in substance, provided that the death of neither plaintiff nor defendant between verdict and judgment should be assigned for error, provided judgment should be entered within two terms after such verdict. 17 Car. II, c. 8, sec. 1. The effect of this statute as construed by the courts was that although plaintiff or defendant died before verdict, if he died during term time, the cause might proceed to trial and judgment upon the theory that the entire term in contemplation of law is but one day. The rule was further modified by a later statute, which provided that, if a plaintiff or a defendant should die, after interlocutory and before final judgment, the action should not abate, if such action could be originally prosecuted by or against the executors or administrators of the parties dying. 8 & 9 William III, c. 11, sec. 6. But, since both of these statutes were enacted after the fourth year of the reign of James I, they and the construction of them by the English cases have no binding force in this country. *Life Association of America v. Fassett,* 102 Ill. 315.

The doctrine above referred to as being supported by the weight of authority in this country has grown up under statutes providing substantially as is provided by the statute of this state, which reads as follows:

"No action pending in any court shall abate by the death of either or both of the parties thereto, except an action for libel, slander, malicious prosecution, for a nuisance, or against a justice of the peace for misconduct in office, which abates by the death of the defendant." (Section 5944, Comp. Laws 1909.)

The time within which, in whose name, and the procedure by which a revivor of any action may be made is provided by sections 5949 to 5959, Comp. Laws 1909. These statutes, except as to certain specifically named actions, abrogate the common-law rule that the action abates upon the death of either party, and provide for its continuance. Upon the death of the plaintiff,

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the action may be revived in the name of the representatives to whom the right has passed. Where the right has passed to the heirs or devisees of the deceased, who could support the action if brought anew, the action may be revived in their name. Section 5954, Comp. Laws 1909. Upon the death of defendant the revivor may be against his personal representative or against both his personal representatives and his heirs, when the right of action survives against them. Section 5955. "While the court ought," as said by one author, "to cease to exercise its jurisdiction over a party at his death, the neglect to do so does not render such judgment void. It is voidable when properly assailed." The reason upon which this rule is founded is that a contrary doctrine would be fraught with great mischief and evil in its results. The final judgments of courts of record ought to have some sanctity. It seems to us that a long step has been taken toward undermining and destroying the stability of all judgments of the court, when it is held that although the record shows the court had jurisdiction of the subject-matter, and had obtained regularly jurisdiction of the parties, and although the judgment upon its face is free from infirmities, and although the facts *aliunde* the record sustain the showing of the record that the court had acquired jurisdiction of the parties, a person who founds his rights upon such a judgment cannot feel secure therein or convince the world of its validity until he can show *aliunde* the record that at no step in the progress of the cause in the court the court lost jurisdiction because of the death of one of the parties. Such a rule would occasionally surround the judgments of all the trial courts with great uncertainty, and would frequently have that effect upon judgments of this court, for a void judgment may be set aside at any time upon motion of either of the parties in the action, or upon motion of any one affected by it.

That such judgments are not absolutely void, but voidable only, does not rest in this state alone upon reason and the expression of the weight of authority from other jurisdictions under statutes similar to section 5944, Comp. Laws 1909, *supra,* but also, we think, upon the expression of the legislative will voiced in other provisions of our Code. Section 6094, Comp. Laws 1909,

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provides that the district court shall have power to vacate its own judgments or orders at or after the term at which any judgment or order was made upon any one of nine grounds specified in nine subdivisions of the section. Some of these subdivisions read as follows:

"First. By granting a new trial for the cause within the time and in the manner prescribed in section 5829. * * * Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order. * * * Sixth. For the death of one of the parties before judgment in the action. * * *"

Section 6101 reads as follows:

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five and seven of section 6094 must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

Under the last sentence of this section any void judgment may be vacated at any time, but by the preceding sentence a judgment may be vacated for death of one of the parties only when the proceeding is begun in three years after the judgment is rendered. It is apparent that this statute does not treat judgments rendered after the death of a party as void, but as voidable only, and this statute was enacted at the same time that section 5944, *supra,* was enacted. Section 6102 makes section 6094 and all subsequent sections of the article, including section 6101, apply to this court, in so far as the same may be applicable to its judgments or final orders. In the following cases, the courts, uninfluenced by any statute similar to the foregoing, authorizing appellate courts to vacate and correct after term time an erroneous judgment for death of one of the parties, have held that the death of one of the parties pending the appeal and before judgment does not make the judgment absolutely void. *Phelen v. Tyler,* 64 Cal. 80, 28 Pac. 114, approved and followed in *Wallace v. Center,* 67

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Cal. 133, 7 Pac. 441, and in *Martin v. Wagner,* 124 Cal. 204, 56 Pac. 1023; *Deppen et al. v. Immohr's Ex'r,* 119 Ky. 413, 84 S. W. 333; *Reid's Adm'r v. Strider's Adm'r,* 48 Va. 76, 54 Am. Dec. 120; *Gibbs v. Belcher,* 30 Tex. 79.

The petition and motion to vacate was filed within three years after the judgment was rendered, and the remaining question to be considered is whether the statute makes it mandatory upon this court, upon the filing of such motion, to make its order vacating the judgment. We are of the opinion that it does not. The language of the statute is that "the court shall have power to vacate or modify its own judgment or final order at or after the term" upon certain named grounds, and not that the court "shall vacate them." Again, section 6098, which is also made by section 6102 to apply to this court in so far as it may be applicable to its judgments and final orders, provides that:

"A judgment shall not be vacated on motion or petition, unless it is adjudged that there is a valid defense to the action on which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action. * * *"

It has not been made to appear that plaintiffs in error have any alleged cause of action stated in their petition in error which they have been unable to present or have been hindered in presenting to this court because of the death of defendant in error. Nor has it been pointed out that they have been prejudiced in any other manner by the court's proceeding to judgment without its attention being called to the death of defendant in error and without revivor of the action. On the other hand their cause was ably briefed and submitted upon stipulation, for aught this record shows, with full knowledge at the time on the part of plaintiffs in error and their counsel of defendant in error's death. This court then determined that their petition and brief in support thereof did not state a cause for reversal of the judgment of the trial court, and no suggestion why we were in error has been made to us and none appears that was not then considered. It is not sought by this motion to have the action revived.

The motion and petition to vacate will therefore be denied, and the mandate may go to the lower court, where such action to

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revive may be taken as the parties may deem necessary, and to which under the law they may be entitled.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

EWING *et ux.* v. EWING.

No. 1276. Opinion Filed September 11, 1912.

(126 Pac. 811.)

TRUSTS—Frauds, Statute of—Constructive Trusts—Evidence. Where A., as agent for the G. heirs, was authorized by them to sell their farm of 142 acres and improvements thereon for $14,000 net, and A. thereafter induced his brother J., who lived in another state and knew nothing of the value of that or similar property in the surrounding country, to come to Oklahoma for the purpose of buying it, which he did, and where A. suppressed that $14,000 was all that was asked for the whole tract and induced J., who relied upon his honesty, to believe that only said tract of land, less one certain five acres in one corner, including the improvements, could be bought for $14,000, which was false, and that A. and wife would take a two-sevenths interest therein if J. would purchase said tract, less the five acres, for that price, which he did, but which agreement they refused to perform, and where, unknown to J., A. thereafter took possession and caused the G. heirs to execute a deed for said five acres to A.'s wife, without further consideration, **held**, that as to said five acres A. acquired title thereto by fraud, that both are trustees **ex maleficio** of a constructive trust, and that the court did not err in decreeing a conveyance thereof to J. **Held** further, that the fact that J. could not have been compelled to convey to A. and wife said two-sevenths interest, because of the want of evidence of their agreement so to do, does not entitle them to invoke the statute of frauds to exclude parol evidence of said agreement.

(Syllabus by the Court.)

Kane, J., dissenting.

Error from District Court, Logan County; A. H. Huston, Judge.

Action by John D. Ewing against Amos A. Ewing and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

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Virgil M. Hobbs and *Devereux & Hildreth,* for plaintiffs in error.

Burford & Burford, for defendant in error.

TURNER, C. J. On January 10, 1908, John D. Ewing, defendant in error, sued Amos A. Ewing and Ella K. Ewing, his wife, in the district court of Logan county to set up a constructive trust. His petition substantially states that on August 21, 1907, certain Green heirs were the owners and in possession of a certain well-improved and cultivated tract of land (describing it) containing 142 acres, situated one-half mile west of the corporate limits of Guthrie, Logan county; that located on about five acres, and in the southwest corner thereof were a large two-story frame dwelling house, orchard, vineyard, windmill, tank, and other improvements of the value of about $3,000; that said heirs were offering to sell the entire tract for $14,000, and had authorized the defendant Amos A. Ewing to find them a purchaser; that said Amos A. Ewing is his brother, and lives in Guthrie, where he has been for fifteen years, and at that time was in the real estate business and well acquainted with the value of farm lands in that vicinity; that plaintiff is a resident of Ohio, and has been for fifty years, with no knowledge of such values, or the value of said farm, all of which was well known to said Amos A. Ewing; that the relation between him and his brother was confidential and friendly and always has been; that up to the times hereinafter mentioned he believed him to be possessed of a good character for honesty and fair dealing, and reposed in him absolute confidence, and trusted his judgment as to the value of land in and about Guthrie; that, with the intent to defraud plaintiff, said Amos A. Ewing falsely represented to him that said farm, less the said five acres, could be bought for $14,000, less his commission of $500 on the sale which he would knock off, and that the same was cheap at that price, whereas, in truth and fact, said heirs had authorized him to sell the entire tract, including said five acres and all improvements thereon, for $14,000; that thereupon, believing said representations to be true, it was agreed between plaintiff and defendant that plaintiff would furnish the money and buy

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said farm and that said defendant would take a two-sevenths interest therein for $4,000, to secure which he and his wife were to execute notes, payable to plaintiff, after which said tract would be cut up into lots and blocks and sold, and after said $4,000 had been repaid out of the proceeds the balance was to be prorated between them according to their several interests; that pursuant thereto said $14,000 was paid to said heirs, who executed to plaintiff a deed thereto, less five acres (describing it); that at the same time, unknown to plaintiff said defendant, with design to cheat and to defraud plaintiff, procured said heirs to execute a deed to his wife, the defendant Ella K. Ewing, conveying to her said five acres, including all improvements thereon, the only consideration therefor being said $14,000 paid by plaintiff; that said deed was made pursuant to a secret understanding between Amos A. Ewing and said heirs, in effect, that for $14,000 they would convey said tract of land, including the five acres, in such proportions and to such persons as the defendant Amos A. Ewing might direct; that said five acres and the improvements thereon thus held by the defendant Ella K. Ewing was thus bought and paid for by plaintiff, and was caused by the defendant Amos A. Ewing to be conveyed to his wife through a breach of confidence reposed in him by the plaintiff; that the same, in equity and good conscience, is his property, which said Ella K. Ewing holds in trust for him; that she paid no consideration therefor; and that defendants have refused to convey the same to plaintiff on demand. He prays for an injunction, and that he be decreed the equitable owner of said five acres and entitled to the fee therein, and that defendants be ordered to convey the same to him by proper deed, and for general relief.

For answer Amos A. Ewing pleaded, in effect, a general denial, and for a second defense admitted that the Green heirs had employed him as agent to sell the whole of said tract of land, including the five acres in controversy, for $14,000 net to them, with the understanding that all over said amount he could get for said land should be his commission. He alleged that plaintiff knew at the time he paid the $14,000 that the same was the purchase price of said tract, less said five acres, which he says he

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and the Green heirs agreed should be his commission. He specifically denied that he had conveyed the same to his wife in fraud, but insisted that the same was done pursuant to an antenuptial contract, whereby he owed her $1,250. For answer the defendant Ella K. Ewing, after general denial, pleaded, in effect, the same.

On the trial the court made the following special findings of fact:

"(1) That the plaintiff and the defendant Amos A. Ewing are brothers, and that the defendants Amos A. Ewing and Ella K. Ewing are husband and wife.

"(2) That, prior to August, 1907, the defendant Amos A. Ewing obtained from the Green family their net price on their entire farm of 142 acres, including the improvements; the same being $14,000.

"(3) That the defendant Amos A. Ewing induced the plaintiff to come to Oklahoma with a view of purchasing land, and showed him the Green farm.

"(4) That the defendant Amos A. Ewing represented to the plaintiff that only 137 acres of the farm was for sale, and that the five acres of the farm in the southwest corner thereof, including the improvements in the way of house, barn, outbuildings, etc., were not for sale, and that the price fixed upon the 137 acres was $15,000, but that that sum included a commission of $500 to him, and that he, of course, would take no commission, thereby leaving the net price $14,500.

"(5) That upon the suggestion and request of the defendant Amos A. Ewing, Fred Green, one of the owners of the land, and the one who was conducting the negotiations, told the plaintiff that said five acres and improvements were not for sale, and that the price of the remainder of the land was $14,500.

"(6) That the Greens, the owners of the land, never at any time raised the price of the land to $15,000, nor to $14,500, but under the arrangement, had a larger price been obtained, the excess over $14,000 was to be retained by the defendant Amos A. Ewing.

"(7) That the plaintiff refused to purchase for $14,500, and upon the suggestion of the defendant Amos A. Ewing the Greens informed plaintiff that he could purchase the 137 acres for $14,000.

"(8) That the plaintiff refused to purchase the 137 acres, unless the defendant would take an interest therein with him, and

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that the defendants verbally agreed with him to take a two-sevenths interest therein, and that he should hold the title thereto, and that they should give their notes for such two-sevenths interest; and thereupon plaintiff contracted with the Greens for the purchase of the 137 acres at the price of $14,000; but the defendants did not carry out the plan to take the two-sevenths interest.

"(9) That the plaintiff examined the land and exercised his own judgment as to its quality and general value, but that the defendants, and especially the defendant Amos A. Ewing, urged and advised its purchase.

"(10) That the reasonable value of the entire tract, including the improvements, was $14,000, and that the reasonable value of the 137 acres, without the improvements, was $11,500, and that the reasonable value of the five-acre tract, including the improvements, was $2,500.

"(11) That the $14,000 paid by the plaintiff was the entire consideration paid to the Greens for the entire farm, and that upon the payment of the same to them they conveyed the 137 acres to the plaintiff, and the five acres, including the improvements, to the defendant Ella K. Ewing, and that no other consideration was paid by either of the defendants for said five-acre tract."

And the following conclusions of law:

"From which the court concludes, as a matter of law, that the proposed purchase of the Green farm was a joint venture between the plaintiff and the defendants, and that each of the parties owed to the other the utmost good faith in the transaction, and that no one of them had the right to secure any private advantage to himself, and that the plaintiff, having furnished the entire consideration for both tracts of land, is entitled to a conveyance of both tracts, and that the conveyance of the five-acre tract to the defendant Ella K. Ewing is held to be in trust for the plaintiff, and it should be decreed that she convey same to him."

Whereupon it was adjudged and decreed by the court that the defendant Ella K. Ewing "holds the title in fee to the five acres of land" (describing it), "in trust for the plaintiff, John D. Ewing, who is the equitable owner thereof and entitled to have the fee conveyed to him," and ordered that both defendants join in a conveyance thereof to him.

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Amos A. Ewing and wife bring the case here. The main question involved is whether the evidence is sufficient to charge defendants with a constructive trust. The trial court, in effect, held that it was, and ordered the trust executed by proper conveyance; and that was right. The precise question is whether, by suppressing the fact that the whole tract could be bought from the Green heirs for $14,000, and leading his brother, by virtue of the confidential relation existing between them, and under the circumstances, to believe, which was false, that said sum, which Amos induced him to pay therefor, would only buy said tract, less the five acres, and causing the title thereof, without further consideration, to be deflected, in effect, to himself, Amos A. Ewing was guilty of obtaining that title by fraud. If so, a constructive trust was properly declared to exist; otherwise not.

In *Moore v. Crawford,* 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878, which was a suit to set up a constructive trust in a tract of land, Chief Justice Fuller, speaking for the court, said:

"Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. And courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done. I Story, Eq., sec. 187."

From which we learn that if (John D. having paid the price of the whole tract) Amos A., by fraud, prevented the title to the five acres in controversy from passing from the Green heirs to John D., equity should treat this case exactly as if he had not done so, and by proper decree vest in John D. the title, of which, by such fraudulent prevention, he was deprived.

1 Perry on Trusts (section 166) says:

"There is another large class of trusts which arise from frauds committed by one party upon another. Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title to obtain such legal title from him

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upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee. If a person obtains the legal title to property by such arts or acts or circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called constructive trusts."

3 Pom. Eq. Jur. (section 1053) says:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advan tage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto,* are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

The books are full of cases where the courts have applied this doctrine to a great variety of facts; but the facts here have no parallel anywhere, so far as we are able to learn. That the Green heirs were willing to part with the whole tract for $14,000, and that John D. would have received a deed therefor on payment of that amount but for the intervention of Amos A., goes without saying. And that Amos A., for his own profit, intervened and prevented that title from passing also goes without saying.

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Quoting approvingly from Perry on Trusts, sec. 181, the court, in *Rollins v. Mitchell,* 52 Minn. 41, 53 N. W. 1020, 38 Am. St. Rep. 519, a suit to have declared a constructive trust in lands, said:

"Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done, interfere and treat the case exactly as if the acts had been done; and this they will do by converting the party who has committed the fraud and profited by it into a trustee for the party in whose favor the acts would otherwise have been done."

As in *Gilpin v. Nettograph Mch. Co.,* 25 Okla. 408, 108 Pac. 382, 29 L. R. A. (N. S.) 477, we held, where Ladd suppressed the fact that, by a secret agreement with the agent of the seller, he was to receive his share in the property to be sold for nothing, and induced Gilpin, who trusted in his honesty and good judgment, to purchase by leading him to believe that Ladd would join therein with him and others and pay for and share therein alike with them, that Ladd was guilty of fraud, so we hold here that when Amos A. suppressed the fact, by secret arrangement with the Green heirs, that they would take $14,000 for the whole tract, and induced John D., who confided in his honesty, to believe that said sum would purchase only said tract less the five acres, and John D. had refused to buy, unless Amos A. and wife would take a two-sevenths interest therein, which, to induce John D. to make the purchase, they agreed to do, without, as we infer, any present intention to, and which they never did, perform, but instead, after the sale, unknown to John D., they secretly secured a deed to and possession of the five acres for which John D's. money had paid, but which, by connivance with the Green heirs, had cost them nothing, Amos practiced a trick on John D. which is, in equity, a fraud, and made of himself a trustee *ex maleficio* of a constructive trust. This for the reason, among others, that Amos A. had violated a confidence justly reposed in him by John D., and in equity and good conscience will not be permitted to profit thereby. Where, as here, one of the parties to a transaction voluntarily assumes, as did Amos A., a confi-

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dential relation to another, he cannot thereafter act for his own gain in violation of such relation.

This was held in *Allen et al. v. Jackson et al.*, 122 Ill. 567, 13 N. E. 840. In that case the corporation acquired a tract of land, subject to an incumbrance thereon, which it agreed to discharge, and laid the land out in lots and blocks and sold the same, making warranty deeds. On suit to enforce the incumbrance, the lot owners applied to the director and president of the corporation and asked him if the company would protect them, and what steps to take. He assured them that the company would protect their rights, and directed them to pay no attention to the suit. Relying on said assurance, no defense was made to the suit, and no steps taken to pay off the incumbrance. Pursuant to decree, the property was sold, and said officer acquired legal title to the lots and claimed the land adversely to said lot owners. On this state of facts, the court held that by directing the lot owners to make no defense, but trust to the company, such officer voluntarily assumed a confidential relation and incapacitated himself to thus purchase the lots to the detriment of the lot owners, and that he took the property in the same situation it was in at the time he assured them that their rights would be protected. The court, in the syllabus, said:

"So, when a person obtains the legal title to property by virtue of a confidential relation and influence, under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interests of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction and fasten it upon his conscience, and convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the real party in interest."

Hayne v. Hermann, 97 Cal. 259, 32 Pac. 171, and *Gruhn v. Richardson et al.*, 128 Ill. 178, 21 N. E. 18.

From which we learn the doctrine, consonant with equity and good conscience, that, although one may be acting as agent for another in a transaction with a stranger, if said agent voluntarily assumes a confidential relation with the stranger, and at his ex-

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pense takes gain to himself by violating the confidence reposed in him in virtue of that relation, equity will intervene and strip him thereof, and vest the title thereto in the party whose confidence he violated.

If a confidential relation is necessary to set up this trust, that such relation existed between Amos A. and John D. is clear; and this for the reason, among others, that they had agreed to become part owners in the purchase. It was only by Amos A. becoming such that John D. would consent to deal, and it was only in this relation that Amos A. gained his confidence and betrayed it. In *Robins v. Hope,* 57 Cal. 493, the court, quoting from 1 Story's Eq. Jur., said:

"The phrases 'confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between 'client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust,* executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith (*uberrima fides*) in all transactions between the parties.' "

In *Scattergood v. Kirk,* 192 Pa. 263, 43 Atl. 1030, quoting approvingly from Darlington's Estate, 147 Pa. 624, 23 Atl. 1046, 30 Am. St. Rep. 776, the court said:

"The confidential relation is not all confined to any specific association of the parties to it. While its more frequent illustrations are between persons who are related as trustee and *cestui que trust,* guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and generally all persons who are associated by any relation of trust and confidence."

In *Harraway v. Harraway,* 136 Ala. 499, 34 South. 836, the court said that "the number or character of the relations are not defined by law; all the variety of relations in which dominion

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may be exercised by one person over another fall within the general term 'confidential relations.'"

In *Thomas v. Whitney,* 186 Ill. 225, 57 N. E. 808, the court, quoting from 2 Pom. Eq. Jur. sec. 947, said:

"The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, Does such a relation in fact exist?"

Or, as stated in 2 Pom. Eq. Jur. (3d Ed.) sec. 956:

"Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

We are therefore of opinion that the facts found are sufficient, in equity and good conscience, to make of Amos A. Ewing and wife trustees *ex maleficio* of a constructive trust, and that the judgment of the lower court should be affirmed; that is, if the wife, by knowledge of and participating in the fraud of her husband, is likewise chargeable as such trustee. On this there was, in effect, a finding adverse to her by the trial court, which the record amply sustains.

In *Moore v. Crawford, supra,* the court said:

"It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive, by intent or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute of frauds by a party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on

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his conscience this character as a means to baffle his injustice or its effects."

See *Logan v. Brown,* 20 Okla. 334, 345, 95 Pac. 441, 20 L. R. A. (N. S.) 298.

There is no merit in the contention that the court erred in admitting parol evidence, over objection, in proof of the agreement between John D. and Amos A. and his wife that the latter were to take a two-sevenths interest in the proposed purchase. On this point the court, in the case last cited, quoting approvingly from *Huxley v. Rice,* 40 Mich. 73, said:

"The fraud of which Moore was guilty was in preventing the conveyance to himself, which would have inured to Monroe, and in obtaining it to his wife, so as to reap the benefit which belonged to his grantee. Mrs. Moore stands in her husband's shoes, and by accepting, with knowledge, is to be treated as a party to his fraud and profiting by it, or as a mere volunteer assisting him to perpetrate the fraud and to profit by it, and is hence to be held, as he could have been, a trustee *ex maleficio.*"

The judgment of the trial court is affirmed.

DUNN, J., concur; HAYES and WILLIAMS, JJ., concur in the conclusion; KANE, J., dissents.

HELIKER-JARVIS SEMINOLE CO. v. LINCOLN *et al.*

No. 1491. Opinion Filed September 11, 1912.

(126 Pac. 723.)

INDIANS—Lands—Inheritance—What Law Governs. Chapter 49 of the Laws of Arkansas (Mansf. Dig.), entitled "Descent and Distribution," controls the descent of land allotted to a member of the Seminole Tribe of Indians, not of Indian blood, who died on the 23d day of August, 1903, after receiving his allotment.

(Syllabus by the Court.)

Turner, C. J., dissenting.

Error from District Court, Seminole County; Robt. M. Rainey, Judge.

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Action by the Heliker-Jarvis Seminole Company against Peter Lincoln and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Crump, Rogers & Harris, for plaintiff in error.

Willmott & Wilhoit, for defendants in error.

KANE, J. On March 3, 1909, the Heliker-Jarvis Seminole Company, a corporation, plaintiff in error, sued Peter Lincoln, Nancy Bruner, Plenty Fay, Alex Fay, John Fay, Albert Carolina, and Peter Carolina in the district court of Seminole county for the partition of 160 acres of land in said county, the allotment of Washington Lincoln, alleging itself to be the owner in fee of an undivided twenty-three forty-fifths thereof by virtue of a transfer to it of the title of defendants Albert Carolina, John Fay, and other alleged heirs at law of said Washington Lincoln, deceased, all duly enrolled citizens of the Seminole Tribe, but not of Indian blood. After the cause was at issue, there was trial to the court upon agreed facts, and judgment rendered and entered "that upon the death of the allottee, Washington Lincoln, the land sought to be partitioned passed in fee simple to the defendant Nancy Bruner as the nearest of kin to the deceased allottee; and that the plaintiff company has no interest in said land; and that the defendants, other than Nancy Bruner, have no interest in said land; and that upon the prayer of the said defendant Nancy Bruner the petition of the plaintiff should be dismissed. It is therefore considered, ordered, and adjudged that the said Nancy Bruner is the sole and only heir at law of the deceased allottee, Washington Lincoln, and inherited the land sought to be partitioned; that the plaintiff has no interest in the land sought to be partitioned; and that this petition be, and the same is hereby, dismissed at the cost of the plaintiff." This upon the theory that the Seminole tribal law for the distribution of personal property governed the devolution of the allotment, instead of chapter 49, Mansfield's Digest of the Laws of Arkansas, as contended for by the plaintiff; and that Nancy Bruner, being the nearest of kin to the deceased, was the sole heir of his estate.

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This was error. It seems quite clear that, where a duly enrolled Indian of the Seminole Nation died on the 23d day of August, 1903, after receiving his allotment, the devolution thereof was governed by chapter 49 of Mansfield's Digest of the Laws of Arkansas, entitled "Descent and Distribution." The lawyers of the Seminole Nation seem to entertain and be about equally divided between three theories in regard to the devolution of Seminole estates: (1) That section 2 of the act of Congress of June 2, 1900, entitled "An act to ratify an agreement between the Commission to the Five Civilized Tribes and the Seminole Tribe of Indians" (chapter 610, 31 St. at L. 250), provides a complete scheme for the devolution of all lands where descent was cast after December 31, 1899, whether allotted or not; (2) that chapter 49, *supra,* applies to estates of the class now under consideration; and (3) the descent is governed by the old tribal laws of the nation.

It has been held by this court, correctly, we think, that section 2, *supra,* does not control the descent of lands allotted to a member of said tribe of Indians who died after the 31st day of December, 1899, who had received his allotment prior to his death. *Bruner et al. v. Sanders et al.,* 26 Okla. 673, 110 Pac. 730. We can find very little support for the theory that the old tribal laws apply. These laws were enacted by the Seminole Indians prior to the ownership of lands in severalty by the inhabitants of that nation, and are poorly calculated to meet the situation which afterwards arose when individual ownership was provided for. We are unable to gather from any act of Congress, or its agreements or treaties with the Seminoles in relation to the allotment of their lands, that it was the intention of Congress or the Indians that these tribal laws should supply rules for the descent and distribution of allotted lands. The original agreement with the Creeks contained a provision to that effect, which was afterwards repealed by the Supplemental Agreement, and the laws of Arkansas substituted. By section 31 of the act of Congress of May 2, 1890 (chapter 182, 26 St. at L. 81), certain general laws of the state of Arkansas, among them chapter 49, entitled "Descent and Distribution," were extended over and put in force in the

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Indian Territory, with the limitation that "nothing in this act shall be so construed as to deprive any of the courts of the Civilized Nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor to interfere with the right and power of said Civilized Nations to punish said members for the violation of the statutes and laws enacted by their national councils, where such laws are not contrary to the treaties and laws of the United States."

It might be held that chapter 49, *supra,* was in force from and after the passage of the foregoing act, and furnished the rule for the devolution of such real estate as was held in severalty, both in the federal and Indian courts, until the latter were abolished, without in any way coming into conflict with the above congressional limitation; but this is not necessary, in view of the subsequent acts of Congress on the same subject. By section 28 of the Curtis Bill (Act June 28, 1898, c. 517, 30 St. at L. 504), the tribal courts were abolished; and section 26 of the same act provides that after its passage "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory." It seems clear that the first of these provisions had the effect of making the laws of Arkansas, theretofore in force in the territory in a limited way, "apply to all persons therein, irrespective of race," and that that section, in connection with the two sections of the Curtis Bill above referred to, entirely abolished all tribal courts and prohibited the enforcement of the laws of the various tribes by the courts of the United States. Thus chapter 49, *supra,* became the general law governing descent and distribution throughout the Indian Territory, except where, like in the Original Agreement with the Creeks, Congress provided otherwise. Section 2 of the act of June 2, 1900, *supra,* cannot in any proper sense be said to constitute a general law of descent and distribution. It is more in the nature of a direction in relation to the allotment of a certain class of Seminole lands and allottees; and its scope, we think, is properly defined in the Bruner case, *supra.*

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The judgment of the court below is reversed and the cause remanded, with directions to proceed in accordance with the views herein expressed.

HAYES, WILLIAMS, and DUNN, JJ., concur; TURNER, C. J., dissents.

WHITMIRE *et al.* v. TRAPP *et al.*

No. 1708. Opinion Filed September 11, 1912.

(126 Pac. 578.)

TAXATION—Allotments—Exemption from Taxation. Cherokee allottees, by virtue of the Cherokee Agreement, under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by the United States Constitution, fifth amendment, from abrogation during that period, as was attempted by the act of May 27, 1908 (35 St. at L. 312, c. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation.

(Syllabus by the Court.)

Error from District Court, Adair County; J. H. Pitchford, Judge.

Action by Walter S. Whitmire and others against M. E. Trapp, Secretary of the State Board of Equalization, and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

Wm. P. Thompson and *Jas. S. Davenport,* for plaintiffs in error.

W. L. Curtis, E. B. Arnold, J. I. Coursey, and *Ad. V. Coppedge,* for defendants in error.

KANE, J. This was a suit in equity, commenced in the district court of Adair county, by the plaintiffs in error, for the purpose of enjoining the collection of taxes for the years 1908 and

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1909, levied against certain lands allotted to members of the Cherokee Tribe of Indians. The court below refused to grant the relief prayed for, and to reverse that order this proceeding in error was commenced.

On the authority of *Choate et al. v .M. E. Trapp, Secy. State Bd. Equalization, et al.*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. ——, *Gleason et al. v. Wood*, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. ——, and *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. ——, the judgment of the court below must be reversed. Those cases sustain the proposition contended for by counsel for plaintiffs in error that Cherokee allottees, by virtue of the Cherokee Agreement under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by the United States Constitution, fifth amendment, from abrogation during that period, as was attempted by the act of May 27, 1908 (35 St. at L. 312, c. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation.

The judgment of the court below is reversed and the cause remanded, with directions to proceed in conformity with this opinion.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

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A. L. JONES & CO. v. COCHRAN *et al.*

No. 1852. Opinion Filed September 11, 1912.

(126 Pac. 716.)

CUSTOMS AND USAGES—Evidence. As a general rule, evidence of usages and customs may not be resorted to to interpret a contract, unless there is ambiguity or uncertainty upon the face of the instrument arising out of the terms used by the parties.

(Syllabus by the Court.)

Error from Pittsburg County Court;
R. W. Higgins, Judge.

Action by G. C. Cochran and C. W. Cochran, doing business as the Cochran Grocery Company, against A. L. Jones & Co. Judgment for plaintiffs, and defendant brings error. Affirmed.

Irenus P. Keith, for plaintiff in error.

W. J. Horton and *R. A. Smith,* for defendants in error.

HAYES, J. Defendants in error brought this action in the court below to recover damages against plaintiff in error, A. L. Jones, doing business under the name of A. L. Jones & Co., for damages sustained by defendants in error from the breach of a contract by plaintiff in error to sell and to deliver to defendants in error a quantity of onion sets. The substantial facts alleged in the petition of defendants in error in the court below and established by their evidence are that on the 19th day of February, 1908, plaintiff in error entered into a written contract with defendants in error, as follows:

"Office of A. L. Jones & Co., Room 1010, 169 Jackson Blvd., Chicago, Illinois. Contract for Onion Sets. Between A. L. Jones & Co., of the city of Chicago, state of Illinois, party of the first part, and Cochran Grocery Co., city of McAlester, state of Oklahoma, party of the second part. Said party of the first part sells party of the second part the following amount of onion sets for delivery January, 1909, 31st day: 100 Bbls. Dark Red sets at $1.20 per 32 lb. bu.; 100 Bbls. yellow sets at $1.10 per 32 lb. bu.;

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25 Bbls. white sets at $1.50 per 32 lb. bu. Following terms and conditions: Net cash, F. O. B. Chicago. Packages charged for extra. Second-hand barrels 20c each; 1 bushel crates 11c. each; new 2 bushel sacks 5c each. Delivery to be made as near specified date as weather will permit. Sets to be in good merchantable condition at time of shipment; to be screened through 1⅛ inch mesh sieve. It is agreed that the party of the first part shall not be held liable for damages for the nonfulfillment of this contract, in case the above-mentioned sets are destroyed by fire or other unavoidable cause. If a portion of the above sets are destroyed, that party of the first part will deliver the balance of the contract. Cochran Grocery Company. A. L. Jones & Company, Brandt. 2-19-08."

Plaintiff in error, in accordance with said contract, delivered 50 barrels of red onion sets, 60 barrels of yellow onion sets and fifteen barrels of white onion sets, but failed and refused to deliver the balance under the contract. On the 31st day of January, 1909, at which time the contract was to be performed by delivery of all the onion sets, the value of said sets per bushel was on the market in Chicago higher than the price stipulated in the contract. Defendants in error recovered judgment in the trial court for $206.50 damages. Plaintiff in error by his answer admits the execution of the contract, but alleges that at the time of the execution of the contract he was engaged in the fertilizing business and incidentally thereto in growing onion sets; that the Chicago Set & Seed Company, a corporation, was also engaged in the growing of onion sets; that neither of them bought or sold on the general market, but sold only the crop grown by them respectively. He alleges that on or about the 1st day of December, 1908, the Chicago Set & Seed Company purchased and succeeded to the business of plaintiff in error in growing onion sets, and entered into a contract to take over his onion sets and to fill his contracts to the extent of the crop raised during the year 1908 by the Chicago Set & Seed Company and A. L. Jones & Company. He alleges that the aggregate of the crop of onion sets grown by him and the said Chicago Set & Seed Company was prorated upon his contracts, thus giving his contracts a much larger percentage than could have been realized if their fulfillment had depended entirely on the sets grown by plaintiff in error. He admits that

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he delivered on the contract only the quantity of sets alleged in the petition of defendants in error, but avers that he was unable to deliver the remainder of the sets under the contract because of an unavoidable shortage in his crop. He alleges that the contract was made in Illinois and to be performed in Illinois; that it was the custom and usage in that jurisdiction, where there is a shortage in crops, so that all contracts cannot be fulfilled, to prorate the crop on all contracts, as was done in this instance. Plaintiff in error undertook at the trial to introduce evidence to the effect that he is an onion grower, engaged in growing onion sets; that he did not purchase and sell onion sets on the market, but sold only onion sets grown by him; that it was the custom and usage among such growers in Illinois to sell their crops of onion sets before they were produced, and, where contracts for the sale of sets to be grown by any grower cannot be filled in full on account of shortage in the crop, to prorate the amount grown upon the various contracts of the grower, as was done in this case; and that such acts on the part of the grower relieves him from further liability under his contract. The purpose of this evidence, all of which was rejected by the trial court, was to show that the parties to the contract here involved contracted relative to specific onion sets, to be grown by plaintiff in error during the year 1908, and to relieve plaintiff in error of liability, because of an alleged shortage in the crop. We think the trial court committed no error in rejecting this evidence.

There is no uncertainty or ambiguity in that portion of the contract which describes the property sold and to be delivered by plaintiff in error in the future. It definitely specifies the quantity and kind of sets and the price to be paid therefor, the place of delivery, the condition in which the sets are to be when delivered, and that they are to be screened. It is not specified that the property sold shall be sets raised by any specified person or upon any specified place. If plaintiff in error had on the date specified in his contract for delivery of these sets gone into the market and procured the kind of sets described in the contract in the quantity therein specified and offered to deliver them to defendants in error, he would have fully complied with his contract. Nor

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do the last two paragraphs of the contract have the effect to render it ambiguous. The first of these paragraphs provides that plaintiff in error shall not be held liable for damages for nonfulfillment of his contract in case the sets are destroyed by fire or other unavoidable cause. This contract was executed before the sets were in existence, and almost a year before the same were to be delivered to the vendee. Plaintiff in error was willing to take the chances on producing or obtaining the sets for delivery as contracted, but desired to relieve himself of the risk of destruction of the sets by fire or other unavoidable cause, after the same were procured for delivery, and by this provision of the contract he relieved himself of such liability. This provision does not undertake to stipulate that, if the onion sets are not produced during said year, he shall be relieved of his liability, but provides that he shall be relieved of all liability "if they are destroyed by fire or other unavoidable cause." The last paragraph of the contract provides only that the plaintiff in error shall have the privilege to and shall, in the event he is unable to fulfill his contract on account of a portion of the sets being destroyed from the causes mentioned in the preceding paragraph, deliver whatever he may have left.

The circumstances under which usages or customs may be resorted to for the purpose of interpreting a contract are well settled. Such extrinsic aid cannot be resorted to when the contract is susceptible of a reasonable construction on its face. Mr. Greenleaf, upon this question, says:

"Their true nature is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature of their contracts arising, not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character, and to fix and explain the meaning of the words and expressions of doubtful and various senses." (2 Greenleaf on Ev. sec. 251.)

The same author again says:

"But, though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain." (1 Greenl. Ev. sec. 292.)

The same doctrine is expressed in *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 535, in the following language:

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"As a general rule, there must be ambiguity or uncertainty upon the face of the writen instrument arising out of the terms used by the parties, in order to justify the extraneous evidence, and, when admissible, it must be limited in its effect to clearing up the obscurity. It is not admissible to add or ingraft upon the contract new stipulations, nor to contradict those which are plain."

The rejected evidence attempts to ingraft upon this contract the stipulations that the onion sets contracted for sale by him were to be those grown by him, and that he is to fulfill only his contract in part, if he should fail to grow them from an unavoidable cause, first, by showing that plaintiff in error is a grower of onion sets, and not a dealer therein; and, second, by showing that it was the custom of such growers in Illinois to contract their crops in advance, and if there was a failure in the crops, which rendered it impossible for the grower to fulfill all his contracts, then to prorate the yield upon the contracts made as a complete fulfillment of the contracts. This, we think, he cannot do in the face of the plain provisions of the contract definitely contracting for the sale of a specific quantity of onion sets of a given kind, but not for any specified sets.

Plaintiff in error cites and relies upon *Dexter v. Norton,* 47 N. Y. 62, 7 Am. Rep. 415; *Ontario D. Fruit-Growers' Ass'n v. Cutting Fruit-Pack. Co.,* 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231, and *Rice & Co. v. Weber,* 48 Ill. App. 573. None of these cases, in our opinion, is in point. They all support the doctrine that where the sale is of specific goods and the goods perish before delivery, without fault of the vendor, the vendee has no right of action for failure of the vendor to deliver. But the question involved here is not whether a vendor is relieved of liability under a contract for the sale of specified articles when destroyed by an unavoidable cause, but is whether there is a contract for sale of specific articles. In *Dexter v. Norton, supra,* the contract was for the sale of a certain number of bales of cotton, each bale of which was marked, and the contract described the particular bales sold. In *Ontario D. Fruit-Growers' Ass'n v. Cutting Fruit-Pack. Co., supra,* the contract was for the peaches grown during a certain year on the orchards or lands particu-

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larly described. In *Rice v. Weber, supra,* the contract was very similar to the one here involved, and the case is more nearly in point than any of the others cited and relied upon. The contract in that case was for the sale and delivery of a certain number of barrels of potatoes. So far as is disclosed by the opinion, it appears that evidence was introduced without objection to show that the vendor was a grower of potatoes, and not a dealer in potatoes; that at the time he made the contract he had a crop of potatoes growing. In construing the contract the Court of Appeals of that state took into consideration this evidence, and held that it was a contract for the sale of specific potatoes. The opinion does not in any place point out wherein the contract involved in that case was ambiguous, and, after carefully reading it, we are unable to see wherein it is ambiguous, and requires any construction. It has been insisted by plaintiff in error that that case is controlling upon this court in the instant case, for the reason the instant case is founded upon an Illinois contract to be performed in that state. If the case were squarely in point, it would not be binding upon this court, for the reason that the case relied upon is not from the highest appellate court of that state.

Several other assignments of error have been made, complaining of the trial court's refusal to give certain instructions, but these instructions in the main would have been proper only if the rejected evidence had been competent; and we need not consider them.

There being no reversible error presented, the judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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DES MOINES INS. CO. OF DES MOINES, IOWA, v. MOON.

No. 1865. Opinion Filed September 11, 1912.

(126 Pac. 753.)

1. **INSURANCE—Construction of Policy—Unconditional and Sole Ownership.** The holder of the naked legal title to property, without any beneficial use or interest therein, has not the unconditional and sole ownership of the property, within the meaning of a provision of a policy of fire insurance providing that the entire policy shall be void if the interest of the insured be other than unconditional and sole ownership of the property insured.

2. **SAME—Conditions—Waiver by Agent—Validity.** A provision of a policy of fire insurance executed in the Indian Territory before the admission of the state, which provided that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership, * * *," was not waived by reason of the fact that the agent, countersigning said policy, had knowledge at the time the policy was issued that the insured did not have unconditional and sole ownership, or by the act of the agent thereafter indorsing upon the policy a vacancy permit, where the policy provided that no officer, agent, or representative of the company shall have power to waive any provision or condition of the policy, unless such waiver, if any, shall be written upon or attached to the policy.

(Syllabus by the Court.)

Williams, J., dissenting.

Error from Bryan County Court;
Chas. A. Phillips, Judge.

Action by W. J. Moon against the Des Moines Insurance Company of Des Moines, Iowa. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Read & Read and *Utterback & Hayes,* for plaintiff in error.

Charles E. McPherren, Charles P. Abbott, and *Charles B. Cochran,* for defendant in error.

HAYES, J. Defendant in error brought this action in the court below to recover on an insurance policy issued by plaintiff

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in error to one Sol. J. Homer, which, after destruction of the property insured, was assigned by Homer to defendant in error. Several questions of law are presented by plaintiff in error's assignments, but the only questions that we need consider and determine are, first, the effect of certain conditions and stipulations in the policy; and, second, whether such conditions and stipulations were waived by the plaintiff in error.

The cause was tried to the court without a jury, whose finding of fact and judgment were for defendant in error, plaintiff below. The evidence bearing upon the questions we shall consider is without substantial conflict. The policy of insurance was issued and countersigned by the local agent of the company at Caddo, Ind. T., on the 10th day of June, 1907, which was before the admission of the state into the Union. A vacancy permit was indorsed upon the policy on the 5th day of December, 1907. On the next day (December 6th) the property insured, which was a one-story frame building, was destroyed by fire. On the 10th day of January, 1908, the policy sued upon was assigned by Sol J. Homer, the insured therein, to defendant in error. The policy contains, among the many other stipulations usually found in the standard fire insurance policy, the following stipulation or condition:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple. * * *"

Another stipulation provides:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto. * * *"

The property insured, together with the land upon which it stood, was purchased by Sol J. Homer, an agent of defendant in

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error, for defendant in error at an execution sale, and a deed was executed to Sol J. Homer, conveying the title thereto.

While the record title at the time the policy was issued, and at the time of the fire, stood in Homer's name, he in fact had no interest in the property, other than as holder of the naked legal title for the benefit of defendant in error, who was the real owner. These facts plainly constitute a violation of the foregoing provision of the policy that the interest of the insured is and shall be an "unconditional and sole ownership." The effect of this clause in the policy is to require that the title of insured shall be the actual and substantial ownership, rather than the strictly legal title; that his interest must be of such nature that he will sustain the whole loss, if the property is destroyed. Cooley's Briefs on Law of Ins. vol. 2, p. 1369. Homer never had any interest in the property or title thereto, except as the holder of the legal title as trustee for defendant in error, who could at any time have compelled a conveyance thereof by Homer to him. In *Arkansas Insurance Co. v. Cox*, 21 Okla. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808, it was held that a vendee of land occupying same under an executory contract of purchase, on which he had paid a portion of the purchase price, and upon which he had made improvements, is an unconditional and sole owner in fee simple of the equitable title, and had such an interest in the property as to comply with the conditions of a policy providing that the same should be void "if the interest of the insured be other than unconditional and sole ownership, both legal and equitable." If defendant in error had taken out a policy of insurance upon this property before its destruction, containing the same clause here under consideration, it could not be questioned, under the authorities, that he has such an ownership in the property as meets the requirements of sole and unconditional ownership; but it is impossible for defendant in error and Homer each to have the sole and unconditional ownership of the property at the time of the issuance of the policy. That the holder of a naked legal title to property, without any beneficial use or interest therein, has not the unconditional and sole ownership, within the meaning of this and similar provisions of insurance

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policies, is, so far as we have been able to examine the cases, the doctrine of all the authorities, among which are the following: *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Martin v. State Ins. Co.*, 44 N. J. Law, 485, 43 Am. Rep. 397; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202, 28 N. W. 555.

The local agent of the company, who countersigned and issued the policy, had knowledge at the time of the condition of the title, and it is insisted by defendant in error that such knowledge constitutes a waiver of the provisions of the policy avoiding it for lack of sole and unconditional ownership in the insured; but this question has heretofore been determined by this court against the contention of defendant in error. *Phoenix Insurance Co. v. Ceaphus*, 29 Okla. 608, 119 Pac. 583; *State Mutual Ins. Co. v. Craig*, 27 Okla. 90, 111 Pac. 325; *Sullivan v. Mercantile Town. Mut. Ins. Co.*, 20 Okla. 460, 94 Pac. 676, 129 Am. St. Rep. 761.

In all of the foregoing cases, there was a clause in the insurance policy prohibiting the agent and officers of the company from waiving any of the provisions or conditions of the policy, except by written indorsement thereon; and this court held that where such contracts were executed before the admission of the state into the Union it would be bound by and follow the rule announced by the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Building Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, which holds that a stipulation requiring waivers to be made only by written indorsement upon the policy applies to conditions existing and within the knowledge of the agent at the inception of the contract, as well as the conditions arising subsequent to its execution. *Phoenix Ins. Co. v. Ceaphus, supra*, is squarely in point. In that case, as in this, the policy was executed before the admission of the state, and the loss occurred afterward. The policy in that case contained the provisions here under consideration. It covered a building, not located upon land owned by the insured at any time prior to its destruction, but upon land belonging to his wife. The insured attempted to establish a waiver of the conditions of the policy by

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showing that he informed the agent of such fact at the time he came to inspect the risk and before the policy was written; but it was held that such fact, by reason of the provisions of the policy limiting the power of the agent, did not constitute a waiver of its provisions rendering the policy void if the building was on ground not owned by the insured in fee simple. In all of the foregoing cases, the court has limited the application of this doctrine to cases arising on contracts executed before the admission of the state, during which time the rule of the Supreme Court of the United States in the Northern Assurance Co. case was the law in this jurisdiction. In *Western National Ins. Co. v. Marsh,* 34 Okla. ——, 125 Pac. 1094, in an opinion by Ames, C., this court refused to follow the rule of the Northern Assurance Co. case in cases arising on contracts of insurance executed since the admission of the state, and, as to such contracts, adopted the rule, supported by the overwhelming weight of authority of the state courts, holding that, where the local agent has the power to accept a risk and deliver a policy of insurance, and is advised and has full knowledge, at the time of the delivery of the policy, that certain conditions of the policy which may be waived are violated, such policy is binding upon the company, notwithstanding the fact that it contains a provision that none of the company's officers or agents can waive any of its provisions, except in writing, indorsed upon the policy. This case, unanimously concurred in by the members of the court, settles the rule in this jurisdiction as to contracts of insurance written after the admission of the state; but it has no application to the contract involved in the instant case.

It is next contended that because the local agent, at the time he indorsed the vacancy permit upon the policy, had knowledge of the condition of the title, the provision of the policy making it essential for the liability of the company thereunder that the insured shall have an unconditional and sole ownership in the property insured was waived; but if the knowledge of the agent of the condition of the title at the inception of the contract cannot, on account of the limitations of his power contained in the policy, operate to waive the provisions of the policy relative to

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the title, no reason appears to us upon which defendant in error's second contention as to waiver can be sustained. One of the provisions of the policy which may be modified by agreement indorsed thereon is that the policy shall be void if the building be or become vacant and unoccupied, and so remains, for ten days. Insured attempted to comply with this provision of the policy upon the building becoming vacant by having indorsed thereon a modification of the provision, whereby the company consents that the building may remain vacant for a period not exceeding 60 days, upon the consideration that the company's liability and the amount of insurance under the policy shall be reduced to two-thirds of the amount as originally written, and to remain while the permit is in force. This modification of the policy the agent had authority to make by the express terms of the policy, when made in the manner it was made, to wit, by a written indorsement upon the policy. But, before this act of the agent took place, the insured had accepted and received his policy, by the terms of which the powers of the agent are defined, and the insured is charged with knowledge or notice of the limitations the policy imposes upon the agent's power. One of these limitations is that he cannot waive the provisions of the policy as to the ownership of the property, unless it be by an agreement indorsed upon or added to the policy. One reason advanced by many of the courts for sustaining oral waivers at the inception of the contract because of the agent's knowledge of the violation of its provisions is that the insured has not received his contract, does not know its provisions, and has no notice of the limitations of the power of the agent; but this reason cannot apply to the second contention of defendant in error. At the time he sought to have one of the provisions of his policy modified in the manner the policy provided, he knew that another condition of his policy was violated; that by the terms of said policy it had not been waived; and that under the terms of the policy it could not be waived by the agent, except in the manner specified by the policy. He never attempted to secure a modification of the contract, with respect to such provision, in the manner authorized by the policy.

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After discussing the doctrine, supported by the decisions from the greater number of the state courts, to the effect that restrictions in a policy on the power of agents with respect to waiver do not apply to those conditions which relate to the inception of the contract, in Cooley's Briefs on the Law of Insurance, at page 2513, it is said:

"The rule stated thus far in reference to waivers of conditions precedent will not generally apply where the waiver relied on is one that has taken place subsequent to the delivery and acceptance of a policy, as the insured is then presumed to have knowledge of the restrictions, and will be bound thereby. He cannot then rely on a waiver by an agent, contrary to the limitations expressed in the policy, unless it appears that the agent's authority has been enlarged."

See, also, *Northern Assurance Co. v. Grand View Building Association, supra; Moore et al. v. H. F. Ins. Co.*, 141 N. Y. 219, 36 N. E. 191; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; *Egan v. Westchester Ins. Co.*, 28 Ore. 289, 42 Pac. 611; *Weidert v. State Ins. Co.*, 19 Ore. 261, 24 Pac. 242, 20 Am. St. Rep. 809; *Sprague v. Western Home Ins. Co.*, 49 Mo. App. 423; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; *Catoir v. Am. Life Ins. & Trust Co.*, 33 N. J. Law, 487; *Bank v. Fireman's Ins. Co.*, 55 W. Va. 261, 47 S. E. 94.

It is true that the condition constituting a violation of the policy in the instant case existed at and before the inception of the contract. This condition did not arise subsequently, but it continued to exist until the property insured was destroyed; and the act of the agent relied upon, as constituting the defendant in error's second contention, as constituting a waiver of the provisions of the policy occurred subsequent to its execution and delivery. No attempt was made in the case at bar to show that the local agent's authority as to the manner in which he could waive provisions of the policy had been enlarged since execution and delivery of the policy. Whether an agent might not, by custom or practice of the company, or by authority specifically granted, be vested with power to waive the provisions of a policy that restricts the agent's authority to waive any condition of the policy

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only by written indorsement upon the policy, and to bind the company by a waiver made in a different manner, we are not called upon by the facts before us to decide.

Defendant in error did not in the court below plead a waiver upon either of the grounds contended for in his brief and considered in this opinion. It is a well-settled rule in this jurisdiction that, in order to rely upon a waiver, the party must plead the facts constituting the waiver. *American Jobbing Association v. James,* 24 Okla. 460, 103 Pac. 670; *Dwelling House Ins. Co. v. Johnson et al.,* 47 Kan. 1, 27 Pac. 100. But where evidence is admitted without objection, showing a waiver, and the cause is tried upon that theory, it has been held that a pleading will be presumed to have been amended to conform to the proof. *St. Paul F. & M. Ins. Co. v. Griffin, ante,* 124 Pac. 300; *Kaufman v. Boismier,* 25 Okla. 252, 105 Pac. 326. It is very questionable, however, whether the record in this case as to the admission of evidence pertaining to the waiver, a part of which was introduced over objection, is such as to entitle defendant in error to rely upon the waiver of the provisions of the policy; but, since it is apparent that, if this cause should be reversed because of introduction of evidence to establish waiver, the questions here considered affecting the merits and decisive of the case would arise in a subsequent hearing, we have deemed it best to decide the case upon the questions considered.

The judgment of the trial court is accordingly reversed and the cause remanded, with instructions to proceed in accordance with this opinion.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., dissenting.

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COSMOPOLITAN FIRE INS. CO. OF NEW YORK v. MOON.

No. 1866. Opinion Filed September 11, 1912.

(126 Pac. 756.)

INSURANCE—Conditions of Policy. Syllabus same as in **Des Moines Insurance Co. v. Moon, ante,** 126 Pac. 753.

(Syllabus by the Court.)

Williams, J., dissenting.

Error from Bryan County Court; Chas. A. Phillips, Judge.

Action by J. W. Moon against the Cosmopolitan Fire Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Read & Read and *Utterback & Hayes,* for plaintiff in error.

Charles S. McPherren, Charles P. Abbott, and *Charles B. Cochran,* for defendant in error.

HAYES, J. Defendant in error brought this action in the court below to recover on a fire insurance policy. The trial in that court was to the court without a jury, and resulted in a judgment for defendant in error, to reverse which this proceeding in error is prosecuted.

The case here presents for our consideration the same propositions presented and considered in *Des Moines Insurance Co. v. Moon, ante,* 126 Pac. 723, and upon the authority of that case the judgment in this case should be reversed, and the cause remanded.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., dissenting.

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SCOVILLE *et ux.* v. POWELL *et al.*

No. 1867. Opinion Filed September 11, 1912.

(126 Pac. 730.)

1. **APPEAL AND ERROR—Review—Findings of Fact.** Where a case is tried and special findings of fact are made, and those findings are based upon oral testimony, such findings are conclusive upon this court upon any disputed and doubtful questions of fact.

2. **SAME—Rulings on Evidence—Briefs and Assignments of Errors.** The action of the lower court in the rejection or admission of evidence will not be reviewed by this court, unless such evidence is set out in the brief of the plaintiff in error, as required by rule 25 (20 Okla. xii, 95 Pac. viii), and assigned as error by proper specification therein.

(Syllabus by the Court.)

Error from District Court, Nowata County;
T. L. Brown, Judge.

Action by the Farmers' Supply Company against B. J. Scoville and wife and W. J. Powell and others to enforce a mechanic's lien. From the judgment finding defendants Scoville and wife indebted to certain of the other parties to the action, B. J. Scoville and wife bring error. Affirmed.

E. B. Lawson, for plaintiffs in error.

W. D. Humphrey, for defendant in error Farmers' Supply Co.

Geo. Campbell, for defendant in error F. F. Clough.

WILLIAMS, J. On April 8, 1909, the Farmers' Supply Company, one of the defendants in error, commenced a proceeding in the district court of Nowata county against the plaintiffs in error, B. J. Scoville and his wife, Lena Scoville, and W. J. Powell, F. F. Clough, F. E. Noel, G. W. Noel, and H. L. Noel, defendants in error in this proceeding.

The said W. J. Powell, as contractor, on March 25, 1908, entered into an agreement with said plaintiffs in error to erect and

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construct a building for them on a certain lot in Nowata, Okla., for and in consideration of the sum of $2,998. The said F. F. Clough, F. E. Noel, G. W. Noel and H. L. Noel did some of the tinning and plumbing work on said building. After said contract was entered into, said Powell procured certain material from the said Farmers' Supply Company for the construction of the said building, in amount in the sum of $1,150.19, which bears interest from August 24, 1908, at the rate of 6 per cent. per annum.

On September 22, 1908, the said the Farmers' Supply Company filed a lien as required by law. On October 6, 1908, the said F. F. Clough filed a lien on the same property in the sum of $100 on balance due. On September 23, 1908, the said F. E. Noel, G. W. Noel, and H. L. Noel, as the Noel Plumbing Company, filed their lien in the sum of $85 for balance due.

Under proper petition, cross-petition, and reply, the issues were made up and a trial had.

The jury, under proper instructions, returned the following verdict:

"We, the jury impaneled and sworn in the above-entitled cause, do on our oath find:

"(1) That defendant W. J. Powell is indebted to plaintiff, Farmers' Supply Co., in the sum of $1,235.48.

"(2) That defendant W. J. Powell is indebted to defendant F. F. Clough in the sum of $107.38.

"(3) That defendant W. J. Powell is indebted to defendants F. E. Noel, G. W. Noel, and H. L. Noel in the sum of $91.37.

"(4) That defendant W. J. Powell is indebted to defendant B. J. Scoville in the sum of $2,023.81.

"(5) That plaintiff, Farmers' Supply Co., is entitled to a lien on lot 3, block 34, Nowata, Oklahoma, in the sum of $1,235.48.

"(6) That F. F. Clough is entitled to a lien on lot 3, block 34, Nowata, Oklahoma, in the sum of $107.38.

"(7) That F. E. Noel, G. W. Noel, and H. L. Noel are entitled to a lien on lot 3, block 34, Nowata, Oklahoma, in the sum of $91.37.

"(8) * * *

"(9) * * *

"(10) * * *"

Plaintiffs in error moved for a new trial, alleging (a) error in the assessment of the amount of recovery; (b) verdict not

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sustained by sufficient evidence; and (c) evidence improperly admitted.

Counsel for plaintiffs in error insists that in paragraph 4 of the verdict B. J. Scoville, one of the plaintiffs in error, was given judgment against the defendant in error W. J. Powell in an excessive amount, to wit, $589.58; but W. J. Powell neither filed any motion for a new trial in the lower court, nor does he present any cross-assignments or specifications of error in this court. The fact that an error may have been committed against W. J. Powell by the jury cannot avail the plaintiffs in error in this proceeding.

As to the contention as to the improper admission of evidence, that appears to have been abandoned in this court, as no specifications as to the rejection of such evidence have been made by plaintiffs in error, as required by rule 25 of this court (20 Okla. xii, 95 Pac. viii).

Under the record as it is presented to this court by the brief of counsel for the plaintiffs in error, the cause having been submitted to the jury under proper instructions, and there being evidence under which the jury could reasonably return its special findings, the same will not be disturbed on review in this court. *First Bank of Hoffman v. Harrison,* 29 Okla. 302, 116 Pac. 789.

In *Seward v. Casler et al.,* 24 Okla. 275, 103 Pac. 740, this court said:

"Where a case is tried * * * and special findings of fact are made, and those findings are based upon oral testimony, such findings are conclusive upon this court upon any disputed and doubtful questions of fact."

Under these authorities, under the facts as disclosed by this record, this court would not be justifiable in disturbing the verdict, so far as it pertains to the plaintiffs in error.

It follows that the judgment of the lower court must be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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McNEAL v. McKAIN.

No. 1868. Opinion Filed September 11, 1912.

(126 Pac. 742.)

PARENT AND CHILD—Negligence of Child—Liability of Parent. A father bought an automobile for the pleasure and comfort of himself and family; his minor son, who was a member of his family, being authorized to use it at any time for such purpose. The son in taking it out for the pleasure of himself and sister, with a friend, who was a guest of the father's family, was a servant or agent of the father in taking his sister and the guest of the family driving therein, and was not performing a service independent of his father, but the business of his father, making the father liable for his negligence in driving it.

(Syllabus by the Court.)

Error from District Court, Logan County;
A. H. Huston, Judge.

Action by Josie M. McKain against Joseph W. McNeal. Judgment for plaintiff, and defendant brings error. Affirmed.

Horace Speed and *Devereux & Hildreth,* for plaintiff in error.

F. H. McGuire and *C. G. Hornor,* for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the lower court, wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant, to recover damages for personal injuries sustained on account of a collision with an automobile belonging to said defendant. On the theory of the plaintiff's evidence, the injuries were occasioned through the negligent handling of defendant's automobile by his son Paul, who was then a minor and living with his father, the defendant; and Paul operated said machine with the consent of the defendant, and, when the accident happened, he was driving with a guest of his (defendant's) house, with his (defendant's) daughter.

The court instructed the jury in part as follows:

"You are instructed that neither parent nor child is answerable, as such, for the act of the other. And the defendant in this

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case cannot be held liable for any act of negligence on the part of his son Paul merely because of such relationship. If you find that the injuries complained of in this case were not caused by any negligence of the plaintiff contributing thereto, but were caused by the negligence of Paul McNeal while he was engaged in business or pleasure of his own and was not acting as the servant of the defendant nor for him nor in the prosecution of the defendant's business, the said Paul would be liable for the injuries sustained by plaintiff, but the defendant would not, and your verdict should be for the defendant. The business of a person in this connection is not necessarily limited to financial matters nor the making of a living, but may include his pleasures, his interests, and duties other than financial, and anything which he directly or indirectly directs to be done."

This instruction is not challenged by any specification of error.

Section 4914, Comp. Laws 1909, provides that "neither parent nor child is answerable, as such, for the act of the other." This statute seems to be declaratory of the common-law rule. At common law no such relation exists between father and son, though the son be living with his father as a member of his family, as will make the tortious acts of the son more binding upon the father than the acts of any other person. The father is not liable for the contracts of the son, within age, except they be for necessaries, and it would be a departure from the common law as a rule to hold him responsible for the son's trespass and wrongs. *Moore v. Powers,* 8 C. B., N. S., 611; *Tifft v. Tifft,* 4 Denio (N. Y.) 175; *Baker v. Haldeman,* 24 Mo. 219, 69 Am. Dec. 430; *Paul v. Hummel,* 43 Mo. 119, 97 Am. Dec. 381. The rule as to the liability of the parent for the tort of the child at civil law is different from that at common law. *Marionneaux v. Brugier,* 35 La. Ann. 13; *Hagerty v. Powers,* 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101. Pothier, in his work on Obligations (volume 2, p. 34), says:

"The doctrine that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any cause in which it is adopted in the English law."

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At common law a minor is liable at any age for a tort, when committed with force, to be proceeded against as an adult. *Jennings v. Randall,* 8 T. R. 335; *Loop v. Loop,* 1 Verm. 177; *Bullock v. Babcock,* 3 Wend. (N. Y.) 391. See, also, *International Land Co. v. Marshall,* 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056.

The plaintiff claims to be entitled to recover, not on the ground of the parental and filial relation, but because the son, Paul, in the operation of the defendant's machine, was his servant and engaged in his business, and the defendant was liable for his negligence. The master is liable to third persons for all damages resulting from the negligence of his servants, acting under his orders, or in the course of his business. Specific directions are not required. It is sufficient if the act was one within the range of the servant's employment. The general rule, as judicially declared in England and America, is that the master is answerable for every wrong of his servant committed in the course of the service and for the master's benefit, though no express command or privity of the master be proven. *Mitchell v. Crassweller,* 76 Eng. C. L. 236; *Maddox v. Brown,* 71 Me. 432, 36 Am. Rep. 336. In *Lashbrook v. Patton,* 1 Duv. (Ky.) 317, it is said:

"Appellant's minor son, whilst driving his two sisters to a 'picnic,' in his father's carriage, drawn by his father's horses, and with his father's approbation, all being members of his father's family, through negligence, ran against appellee's carriage, causing his horse to frighten and run, turn over and break his carriage, and throw out his daughter. * * * The son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant. The doctrine that masters are responsible for the injuries arising from the carelessness of their servants whilst in the master's employment and the discharge of their duties has been so long recognized and acted on that we scarcely deem it necessary to elaborate the reasons or recite authorities."

See, also, *Bard v. Yohn,* 26 Pa. 482; *Howe v. Newmarch,* 12 Allen (Mass.) 49; *Herlihy v. Smith,* 116 Mass. 265; *Mirick v. Suchy,* 74 Kan. 715, 87 Pac. 1141 [11 Ann. Cas. 366]; *Smith*

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v. Davenport, 45 Kan. 423 [25 Pac. 851, 11 L. R. A. 429, 23 Am. St. Rep. 737]; *Sheridan v. Chadwick,* 4 Daly (N. Y.) 338.

In 1 Shear. & R. Neg. (5th Ed.) sec. 147, the rule is laid down as follows:

"In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to the master."

See, also, *Sheridan v. Chadwick, supra; Cavanaugh v. Dinsmore,* 12 Hun (N. Y.) 465; *Bard v. Yohn, supra; Joel v. Morison,* 6 Car. & P. 501.

An automobile is not *per se* a dangerous agency. *Lewis v. Amorous,* 3 Ga. App. 50, 59 S. E. 338; *Shinkle v. McCullough,* 116 Ky. 960, 77 S. W. 196, 25 Ky. Law Rep. 1143, 105 Am. St. Rep. 249; *Christy v. Elliott,* 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; *Chicago v. Banker,* 112 Ill. App. 94; *McIntyre v. Orner,* 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; *Indiana Springs Co. v. Brown,* 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656; *Smith v. Jordan,* 211 Mass. 269, 97 N. E. 761; *Hartley v. Miller et al.,* 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81; *Slater v. Advance Thresher Co.,* 97 Minn. 305, 107 N. W. 133; *Dailey v. Maxwell,* 152 Mo. App. 415, 115 S. W. 355; *Hall v. Compton,* 130 Mo. App. 675, 108 S. W. 1122; *Danforth v. Fisher,* 75 N. H. 111, 71 Atl. 535, 21 L. R. A. (N. S.) 93, 139 Am. St. Rep. 670; *Vincent v. Crandall,* 131 App. Div. 200, 115 N. Y. Supp. 600; *Knight v. Lanier,* 69 App. Div. 454, 74 N. Y. Supp. 999; *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016, 26 L. R. A. (N. S.) 382, 19 Ann. Cas. 1227; *Jones v. Hoge,* 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915.

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So the rules that apply at common law as to the servant in charge of vehicles belonging to the master are applicable to chauffeurs or persons in charge of motor cars of the master. Vehicles and motor cars may be used, not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error, had been driving his father's carriage (whilst he was a member of his family) in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and servant would exist, and the father would be liable for the negligent acts of the minor son whilst engaged in the driving of the carriage, and the same rule is supported by authority as to motor cars. *Stowe v. Morris,* 147 Ky. 386, 144 S. W. 52; *Smith v. Jordan,* 211 Mass. 269, 97 N. E. 761; *Moon v. Matthews,* 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902.

In the following cases the relation of master and servant as between father and son was held not to exist: *Reynolds v. Buck,* 127 Iowa, 601, 103 N. W. 946; *Doran v. Thomsen,* 74 N. J. Law, 445, 66 Atl. 897; *Cunningham v. Castle,* 127 App. Div. 580, 111 N. Y. Supp. 1057; *Maher v. Benedict,* 123 App. Div. 579, 108 N. Y. Supp. 228. In *Doran v. Thomsen, supra,* the first paragraph of the syllabus is as follows:

"Where a father was possessed of an automobile which he kept upon his premises, and his daughter, about nineteen years of age, was accustomed to drive it and did so whenever she felt like it, asking permission to use it when the father was at home, but, when not at home, took it sometimes without permission, there being no proof that the daughter was actually employed by the father to operate the machine, *held,* in an action against the father, where the daughter in using the machine for her own pleasure in driving her personal friends negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master, and that a motion for a direction of a verdict for the defendant should have prevailed."

In the opinion it is said:

"It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and by permitting

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them to be used by his children for their appropriate purposes injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to third persons, that such use must be in furtherance of and not apart from the master's service and control, and fails to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs. The reason for liability is founded upon the idea of control which a master has over his servant. The court, although attempting to rest the liability upon the relation of master and servant, yet actually tested the liability by the fact that she was intrusted with the operation of the machine for her own pleasure, if purchased for that object, whereby she *ipso facto* became a servant. So that the charge thus, in fact, left the legal relationship of master and servant out of account and raised it in name only because the daughter was allowed to drive the machine."

The syllabus would indicate that the New Jersey case was against the rule announced above by this court, but it seems to go further than the opinion in the case justifies. If the daughter had had the machine out for the pleasure of the members of her father's family, that would have been a different case from that decided by said court.

In *Stowe v. Morris, supra,* the Kentucky Court of Appeals seems to regard *Doran v. Thomsen, supra,* as in conflict with its holding in that case, the syllabus of which is as follows:

"Where defendant bought an automobile for the comfort and pleasure of his family, his son being authorized to use it at any time for such purpose, the son, in taking it out for the pleasure of himself and sister, with whom were some friends, was a servant or agent of defendant, not performing an independent service of his own, but the business of defendant, making defendant liable for his negligence in driving it."

In 75 Central Law Journal, at page 43, the editor appears to disagree with the application of the New Jersey case by the Kentucky appellate court.

In *Maher v. Benedict, supra,* the syllabus is as follows:

"(1) The owner of a motor car is not liable for injuries resulting from the negligent driving of the car by his son, merely

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because of his ownership, or because he permitted his son to drive the car, or because the driver was his son. (2) Defendant is not liable for injuries resulting from the negligent driving of his motor car by his son, where the son at the time was engaged in delivering presents on his own account, and had taken the car out without the defendant's knowledge or consent, since the relation of master and servant did not exist between them at the time of the accident. * * *"

In *Stowe v. Morris, supra,* this case is also cited as being in conflict with the holding therein. We do not so construe *Maher v. Benedict.* We have been unable to find any case holding that where the father bought an automobile to be used for the purpose of the pleasure of his family, and a minor child, who was a member of his family, either with the express or implied consent of the father, took the automobile out and drove it, carrying therein members of the family, including guests of said family, the child who drove that machine was not the servant, expressly or impliedly, of the father. *Daily v. Maxwell,* 152 Mo. App. 415, 133 S. W. 351, goes still further, and holds that where the father purchases a motor machine for the use of his family and their pleasure, and where the minor son uses that car for his own pleasure, neither having any members nor any guests of his father's family therein, in operating that machine solely for his pleasure the relation of master and servant exists. We are not to be understood as here approving the length to which the rule is extended in that case; for it is not essential to determine that question in order to dispose of this case. See, also, in addition to the cases heretofore cited to the effect that an automobile is not *per se* a dangerous agency, wherein the question of negligence of the owner of the car is dealt with, the following other cases where the question as to liability on account of motor car accidents is considered: *Slater v. Advance Thresher Co., supra; Evans v. A. L. Dyke Automobile Supply Co.,* 121 Mo. App. 226, 101 S. W. 1132; *Freibaum v. Brady,* 143 App. Div. 220, 128 N. Y. Supp. 121; *Cunningham v. Castle, supra; Clark v. Buckmobile Co.,* 107 App. Div. 120, 94 N. Y. Supp. 771; *Lotz v. Hanlon,* 217 Pa. 339, 66

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Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Mattei v. Gillies,* 11 Ont. W. R. 1085.

The judgment of the lower court must be affirme.d

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

PUMROY, *Sheriff, et al.* v. BUCK.

No. 1869. Opinion Filed September 11, 1912.

(126 Pac. 735.)

1. **MUNICIPAL CORPORATIONS—Towns—Extension of Boundaries.** Lands adjoining an incorporated town which have been laid off and platted do not thereby become annexed thereto and form a part thereof, unless the trustees by resolution of their board extend the boundary of such town so as to include such lands, as provided by section 873, Comp. Laws 1909.

2. **HOMESTEAD—Extent—Lands Outside Municipality.** Such lands are subject to section 1, art. 12, Williams' Ann. Const. Okla., which provides: "The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. * * *"

(Syllabus by the Court.)

Error from District Court, Pawnee County;
M. C. Garber, Judge.

Action by J. W. Buck against C. I. Pumroy, Sheriff, and Ed. Louthan, Deputy Sheriff, of Pawnee County. Judgment for plaintiff, and defendants bring error. Affirmed.

T. J. Womack, for plaintiffs in error.

Eagleton, Biddison & Merrit, for defendant in error.

KANE, J. This was a suit commenced by the defendant in error, plaintiff below, against C. I. Pumroy, sheriff of Pawnee county, Okla., and Ed. Louthan, his deputy, to enjoin them from levying an execution upon certain real estate belonging to the plaintiff. The court below granted the relief prayed for, to reverse which action this proceeding in error was commenced.

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It is the contention of the plaintiff that the real estate involved is exempt from execution, because it is his homestead. The defendants contend that the real estate is within the borders of Maramec, an incorporated town, and therefore the plaintiff is entitled to hold exempt as a homestead a tract not exceeding one acre of land, and that the land they sought to levy the execution against is land in excess of that amount, but not more than 160 acres owned by said plaintiff. So the question is whether the land sought to be levied upon is "within" the town of Maramec in contemplation of section 1, article 12, Williams' Ann. Const. Okla., which provides:

"The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. * * *"

There is evidence tending to show the incorporation of Maramec, and that the land sought to be levied upon was not within its borders as originally incorporated. There is also evidence to the effect that the land sought to be levied upon, together with other lands, were platted by certain parties as the "South Side Addition to the city of Maramec." But there is no evidence tending to show that the addition thus platted ever became a part of the incorporated town in accordance with section 873, Comp. Laws 1909, which provides:

"Whenever there shall be lots laid off and platted adjoining such town, and a record of the same is made in the register of deeds' office of the proper county, the trustees may by a resolution of their board extend the boundary of such town so as to include such lots; and the lots so annexed shall thereafter form a part of such town and be within the jurisdiction thereof. The trustees shall immediately thereafter file a copy of such resolution, together with the plat and map of survey defining the boundaries of such additions, in the office of the register aforesaid."

Section 872 provides for the extension of the corporate limits by petition, and section 874 provides procedure for the annexation of contiguous territory "when not platted or laid out or recorded." The corporate limits of Maramec have not been

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extended, so far as the evidence shows, by any of the above methods.

Counsel for plaintiffs in error cites authorities to the effect that whether certain lots or blocks are rural or urban does not depend upon the fact of incorporation, and that the lines of a municipality do not determine whether a home is rural or urban. None of these authorities are in point here. The contention of counsel for plaintiffs in error is that the lots are within the incorporated town of Maramec. The evidence, to our mind, does not establish that to be a fact.

The judgment of the court below must therefore be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

LINK v. SCHLEGEL.

No. 1883. Opinion Filed September 11, 1912.

(126 Pac. 376.)

FORCIBLE ENTRY AND DETAINER—When Maintainable. Under the statutes of this state, in the absence of the relation of landlord and tenant, a person who has never been in possession of the premises in controversy cannot maintain an action of forcible entry and detainer against one in possession under color of title.

(Syllabus by the Court.)

Error from Bryan County Court;
Chas. A. Phillips, Judge.

Action by E. Schlegel against J. B. Link. Judgment for plaintiff on appeal from justice, and defendant brings error. Reversed and remanded.

McPherren & Abbott and *C. B. Cochran,* for plaintiff in error.

T. B. Wilkins, for defendant in error.

HAYES, J. This is a forcible entry and detainer action, instituted originally by defendant in error in a justice court of

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Bryan county. From a judgment in that court an appeal was taken to the county court, in which, upon a trial, a verdict and judgment was rendered in favor of defendant in error for possession of the lands and premises described in his petition.

The material facts established by the evidence of defendant in error are: That in December, 1907, plaintiff in error occupied the premises in controversy as a tenant under a lease for five years, about one year of the term of which had expired. Plaintiff in error was at that time indebted to defendant in error upon a promissory note which was past due. Plaintiff in error orally assigned his lease to defendant in error for a consideration of $150, to be credited as part payment upon plaintiff in error's note, which was done. Plaintiff in error continued to occupy the premises; and when demand was made upon him to deliver possession of the same to defendant in error, which was done in the first part of the succeeding year, plaintiff in error refused to deliver possession.

Plaintiff in error by his answer, which his evidence tends to support, denies that he ever sold the lease to defendant in error, and denies that defendant in error is the owner of said lease, and pleads the statute of frauds. The two propositions urged principally by plaintiff in error for reversal of the cause are, first, that the parol assignment of the lease, if made, is void, being in violation of the statute of frauds; and, second, that defendant in error cannot recover in this action, for the reason that he has never been in possession of the lands in controversy. In answer to the first proposition defendant in error insists that the contract has been taken out of the statute by part performance. We do not regard a consideration of these contentions necessary, however, because in our opinion upon the second ground urged by plaintiff in error defendant in error cannot maintain this action. The action of forcible entry and detainer is possessory in its nature, and has for its purpose the restitution of possession of lands and tenements to one who has been deprived of such possession by force. The right to maintain the action is not determined by plaintiff's right of possession, but by whether he has been in possession and such possession has been taken from him by

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force; and, unless otherwise provided by statute, a person who has never been in possession of lands cannot maintain the action. 19 Cyc. pp. 115, 1128.

The statutory provisions in this state relative to this action are to be found in sections 6429 and 6430, Comp. Laws 1909. Section 6429 reads as follows:

"Any justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into land or tenements, unlawfully and by force hold the same, and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

It is apparent that the foregoing statute contemplates that the result of the action shall be a means of restoring possession of lands and tenements to persons who are deprived thereof in one of the two ways named, to wit, by an unlawful and forcible entry and detention, or by an unlawful and forcible detention after a lawful and peaceable entry. In each instance, however, the possession of the complaining person must have been entered either unlawfully or lawfully; and in the second case held by force. Statutory provisions similar to the foregoing are generally construed by the courts not to authorize one who has never been in possession to maintain the action. *Boyle v. Boyle,* 121 Mass. 85; *Woodside v. Ridgeway,* 126 Mass. 292; *Clay v. Sloan,* 104 Tenn. 401, 58 S. W. 229; *Necklace v. West,* 33 Ark. 682; *De Graw v. Prior,* 53 Mo. 313; *Schwinn v. Perkins,* 79 N. J. Law, 515, 78 Atl. 19, 32 L. R. A. (N. S.) 51, 21 Ann. Cas. 1223; *Haller v. Blaco,* 14 Neb. 195, 15 N. W. 348; *Womack v. Powers et al.,* 50 Ala. 5.

Under the succeeding section of the statute, the action may be maintained in some instances by plaintiff who has never been in possession. Said section reads as follows:

"Proceedings under this article may be had in all cases against tenants holding over their terms; in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment

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or decree, by virtue of which such sale was made in sales by executors, administrators, guardians and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper court, and the same by said court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession. This section is not to be construed as limiting the provisions of the first preceding section."

The facts in the case at bar do not bring it within any of the provisions of this section. Under the last clause of the section, a plaintiff having the right of possession, although not having the actual possession, may maintain the action, if defendant occupies the lands and tenements without any color of title. Right of possession alone is essential to his maintenance of the action. *Price v. Olds,* 9 Kan. 66. But plaintiff in error in this case is not without color of title. He holds the written paper title to the leasehold estate. If we assume that there has been such a part performance as to take the contract of assignment out of the statute of frauds, plaintiff in error still holds the paper title to the leasehold estate; and what the court is asked to do in this action is to determine, not only whether plaintiff in error has unlawfully and by force withheld possession from defendant in error, but also to determine which of the two parties has the right of possession by determining who in fact at the present time has the leasehold estate in the lands in controversy. Plaintiff in error, therefore, is not without color of title, and to try this action would require the court to try the title to the lease, which it is not authorized to do.

The judgment of the trial court should be reversed and the cause remanded for further proceedings in accordance with this opinion.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

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TURNER *et al.* v. HUFFSTETLER.

No. 2221. Opinion Filed September 11, 1912.

(126 Pac. 730.)

APPEAL AND ERROR—Dismissal—Failure to File Briefs. Where plaintiffs in error fail to serve and file their brief in accordance with rule 7 of this court (20 Okla. viii, 95 Pac. vi), or within the extension of time thereafter granted by the court, the appeal will be dismissed for want of prosecution.

(Syllabus by the Court.)

Error from District Court, Creek County; W. L. Barnum, Judge.

Action between F. W. Turner and others and Mary Huffstetler. From the judgment Turner and others bring error. Dismissed.

Hughes & Miller, for plaintiffs in error.

Henry McGraw and *Thompson & Smith,* for defendant in error.

HAYES, J. This case was filed in this court on December 29, 1911. Plaintiffs in error have failed to serve and file their brief in compliance with rule 7 of this court (20 Okla. viii, 95 Pac. vi), or within the extension of time thereafter granted by the court; and upon the authority of *Douglas v. Clayton Townsite Co.,* 29 Okla. 9, 115 Pac. 1016, *Bank of Taft v. Thompson,* 29 Okla. 683, 119 Pac. 124, *Bruce v. Ketcham,* 29 Okla. 685, 119 Pac. 124, and *Lugrand v. Harris,* 29 Okla. 690, 119 Pac. 127, this appeal must be dismissed for want of prosecution.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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RICHARDSON *et vir* v. BEIDLEMAN *et al.*

No. 2523. Opinion Filed September 11, 1912.

(126 Pac. 818.)

1. **APPEAL AND ERROR—Case-Made—Settling and Signing—Authority of Ex-Judge.** An ex-judge is not authorized by section 6075, Comp. Laws 1909 (section 4445, St. Okla. T. 1893; section 4742, Wilson's Rev. & Ann. St. 1903), to sign and settle a case-made, if, at the expiration of his term of office, the time for making and serving case-made has expired, or no time for signing and settling the case-made has been fixed before his retirement.
   (a) The amendment of March 9, 1910 (Sess. Laws 1910, c. 39, sec. 1, pp. 59, 60), to section 6075, **supra,** did not change this rule when the ex-judge, or the judge who tried the cause, was living or not otherwise incapacitated from settling and signing the case-made.

2. **SAME—Record—Motion for New Trial.** A motion for new trial or a motion to vacate an order is not a part of the record brought up by a transcript.

3. **SAME—Time of Taking Appeal.** When the action of the lower court is sought to be reviewed by a transcript, the proceeding in error must be commenced in this court within a year (now six months) from the date the judgment order sought to be reviewed is rendered.

4. **SAME—Right to Appeal—Fault of Appellant.** If parties allow the time provided by law for perfecting a case-made to expire without complying with the requirements essential to have the same signed and settled, they cannot be heard to say that they have been deprived of their right to appeal through no fault on their part.

(Syllabus by the Court.)

Error from District Court, Okmulgee County;
W. L. Barnum, Judge.

Action by Katy Richardson and James Richardson against George C. Beidleman and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

R. M. Dick, J. L. Newhouse, and *F. F. Lamb,* for plaintiffs in error.

Lex V. Deckard, Eaton, Beidleman & Carter, and *W. W. Wood,* for defendants in error.

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WILLIAMS, J. Judgment was rendered in favor of the defendants (defendants in error) on April 2, 1910. On the same day the plaintiffs (plaintiffs in error) filed their motion for new trial. On June 6, 1910, the same was overruled. Thereupon the plaintiffs were allowed 90 days in which to make and serve a case-made, the defendants to have 30 days to suggest amendments, and the case-made to be presented for settlement by either party giving the other ten days' notice. On June 7, 1910, plaintiffs filed a motion to set aside the judgment formerly entered, which was overruled. Motion for new trial upon the motion to set aside the judgment, being filed in due time, was denied on June 28, 1910, on which date plaintiffs were allowed 60 days in which to make and serve a case-made, and defendants twenty days thereafter in which to suggest amendments, the case-made to be presented for settlement by either party giving the other ten days' notice. On July 29, 1910, the time for making and serving case-made in said cause was further extended to October 1, 1910, the defendants having twenty days in which to suggest amendments, the case-made to be settled upon ten days' notice by either party.

In the action in the lower court Katy Richardson and James Richardson were plaintiffs and George C. Beidleman, International Land Company of Muskogee, Okla., R. G. Galloway, A. F. Boone, Alfred F. Boone, Frank F. Lamb, and Albert Anderson, defendants. Before decree, however, the suit was dismissed as to the International Land Company. In the decree the title to certain land was quieted in favor of the plaintiffs, but a lien was adjudged in favor of George C. Beidleman, the said R. G. Galloway, A. F. Boone, Alfred F. Boone, and Frank F. Lamb being therein enjoined from claiming any right, title, interest, or estate in and to said premises by virtue of any deed or conveyance held by them, or either of them. The defendant Albert Anderson was also adjudged to be the owner of an undivided two-thirds interest in and to certain part of said land. This proceeding in error to review said decree is prosecuted by Katy Richardson and James Richardson, as plaintiffs in error, against George C. Beidleman and Albert Anderson, as defendants in error. On

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the 9th day of January, 1911, notice by George C. Beidleman and Albert Anderson, as defendants, that the case-made would be presented to Hon. Wade S. Stanfield, at his chambers in the city of Okmulgee, Okla., for settlement, on the 20th day of January, 1911, or as soon thereafter as counsel could be heard, for settlement, was accepted by Frank F. Lamb, attorney for plaintiffs. Subsequent to January 9, 1911, the date on which the term of Hon. W. L. Barnum, judge of said district, expired, a ten days' notice of the time and place on which the said case-made in said cause would be presented to him for signing and settlement was given by plaintiffs. At said time, to wit, March 30, 1911, the case-made was signed and settled by him. It appears that amendments were neither suggested nor waived by either George C. Beidleman or Albert Anderson.

Under the rule heretofore announced by this court in *Burnett v. Davis,* 27 Okla. 124, 111 Pac. 191, following *Barnes v. Lynch,* 9 Okla. 11, 59 Pac. 995, the time for making and serving a case-made having expired, and no time for settling the case-made before Judge Barnum having been fixed before his retirement from office, he was not authorized to settle this case-made, and his act in doing so was a nullity. It is insisted, however, that, before his retirement from office, the time for settling and signing the case-made before his successor, Wade S. Stanfield, had been fixed by a notice served by the defendants, and therefore the settling and signing the same before said successor renders the case-made valid. If Judge Stanfield was not authorized by law to sign and settle the case-made, the fact that the defendants served notice that the same would be presented to him for settling and signing would not authorize him to settle and sign the same. *Bettis v. Cargile et al.,* 23 Okla. 301, 100 Pac. 436; *American Nat. Bank v. Merganthaler Linotype Co.,* 31 Okla. 533, 122 Pac. 507.

The question arises, however, as to whether Judge Stanfield, as Judge Barnum's successor, was authorized to settle and sign the same. Section 4445, St. Okla. T. 1893 (section 4742, Wilson's Rev. & Ann. St. 1903; section 6075, Comp. Laws 1909), which was construed by this court in *Burnett v. Davis, supra,*

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was amended by act of the Legislature of March 9, 1910 (Sess. Laws 1910, c. 39, sec. 1, pp. 59, 60), by adding the following proviso:

"Provided, in case of death or other inability of the judge who tried the cause, his successor in office may extend the time for making and serving such case-made and may settle and sign the same in all respects the same as might have been done by the judge who tried said cause and may take testimony concerning the same, and the time intervening between death or disability of such judge and the qualification of his successor shall not be included in the computation of time allowed for the preparation of such case-made and the appeals of such cases."

Obviously retirement from office does not operate as an inability under the language of this statute, for preceding said proviso the following language is used, which was also contained in the statute prior to amendment, to wit:

"And in all causes heretofore or hereafter tried, when the term of the office of the trial judge shall have expired or may hereafter expire before the time fixed for making or settling and signing a case, it shall be his duty to certify, sign or settle the case in all respects as if his term had not expired."

Then the following proviso:

"In case of death or other inability of the judge who tried the cause, his successor in office may extend the time for making and serving such case-made and may settle and sign the same in all respects the same as might otherwise have been done by the judge who tried said cause. * * *"

If the judge who tried this cause is not dead or otherwise incapacitated, although he may have retired from office, under the language, "as might have otherwise been done" by him, he could only settle said case-made in the event that the time fixed or allowed for making and serving the same had not expired, or when such term had expired, the case-made having been served within due time and the time for settling and signing the case-made had been fixed by serving notice of the presentation of the same for settlement in accordance with the order of court. The proviso seems to have the effect in case of death or inability to authorize his successor to act only when the time for making and serving case-made had not expired or the time for presenting same for settlement had been fixed.

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Inability means "quality or state of being unable." If a judge is not dead, although his term of office may have expired, he is able to settle a case-made, unless he is insane or physically, on account of sickness or other such inability, incapacitated, or is absent from the state. *Whitely v. St. Louis, E. R. & W. Ry. Co.*, 29 Okla. 63, 116 Pac. 165. There is no showing that any such inability existed; on the contrary, it does appear that on the 30th of March Judge Barnum settled this case-made, when none of the conditions existed required by the statute in order for him to be authorized to settle same after his retirement from office. It appears that counsel first acted on the assumption that Judge Stanfield was the proper one to settle this case-made, and that afterwards, reaching a contrary conclusion, Judge Barnum was procured to settle the same. The act of Judge Barnum, however, in settling the case-made, is rendered void on account of the fact that no notice was served prior to the expiration of his term of office fixing the time in which it would be presented to him for settlement.

It is further insisted by counsel for the plaintiffs (plaintiffs in error) that a stipulation is contained in the record, signed by the attorneys of record in the case in the lower court, wherein the defendants (defendants in error) waived the right to suggest amendments, and under the authority of *St. Louis & S. F. R. Co. v. Davis, post,* 120 Pac. 562, and *Brady v. Bank of Commerce of Coweta, post,* 121 Pac. 250, a rehearing should be granted and the petition to dismiss overruled. But the record does not bear out the statement of counsel. The purported stipulation, which reads that "the defendant waived the right to suggest amendments in said case-made, and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the plaintiff in error that the judge of said court settle the same and order the same certified to the clerk of the district court and filed according to law," is not signed by all the parties to this proceeding, being signed only by Lex V. Deckard, as attorney for Alfred F. Boone and R. G. Galloway. The following other indorsement is made in said record:

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"Service of summons out of the Supreme Court is hereby waived. [Signed] Albert Anderson. George C. Beidleman."

It is also insisted by counsel for plaintiffs (plaintiffs in error) that the purported case-made may be considered as a transcript, the same having been certified by the clerk as such, and, for that reason, the proceeding in error should not be dismissed as to certain questions that may be reviewed by transcript. The judgment or decree was entered on April 2, 1910. The petition in error, with transcript attached, was filed in this court over a year from that date, to wit, on April 14, 1911. The motion for a new trial is not a part of the record brought up by a transcript. *Tribal Development Co. et al. v. White Bros. et al.*, 28 Okla. 525, 114 Pac. 736, and authorities therein cited; *Craig v. Greer et al., ante,* 124 Pac. 1096, decided by this court on May 14, 1912, and authorities therein cited.

When the judgment of the lower court is sought to be reviewed by a transcript, the proceeding in error must be commenced in this court within a year from the date such final judgment or order is rendered. *W. F. Doorley v. Buford & George Mfg. Co.*, 5 Okla. 594, 49 Pac. 936; *Burdett et al. v. Burdett et al.*, 26 Okla. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964; *Reed et al. v. Woolly,* 31 Okla. 783, 123 Pac. 1121.

It is further insisted that the judgment or order entered on June 7, 1910, overruling plaintiffs' motion to strike or vacate the judgment or decree rendered on April 2, 1910, is an appealable order, and that the petition in error, with transcript attached, was filed in this court within one year from June 7, 1910. But such motions are not a part of the record proper, and can only be preserved and presented for review on proceeding in error by means of a bill of exceptions or case-made. *Tribal Development Co. et al. v. White Bros. et al., supra; Craig v. Greer et al., supra.* Neither the motion to vacate or grant a new trial nor the evidence presented in support thereof being preserved and brought up as a part of the record by means of a bill of exceptions or case-made, it follows that no assignments or specifications of error as to the motion to vacate can be considered in this proceeding.

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As to plaintiffs' contention that they have been deprived of their constitutional right to present a complete appeal to the Supreme Court by means of a proceeding in error, in *Hess v. Harrah,* 28 Okla. 627, 115 Pac. 790, it was held that, where the question sought to be reviewed on appeal could have been presented by means of a transcript, a case-made not being essential, the plaintiff in error cannot be said to be without fault, not having proceeded by means of a transcript, and for that reason he is not entitled to have the cause remanded for a new trial as in cases where, on account of the death of the trial judge, the plaintiff in error was prevented from having a case-made signed and settled. In *Ripey & Son v. Art Wall Paper Mill,* 27 Okla. 600, 112 Pac. 1119, it was held that where the plaintiff in error was without fault, and he was prevented by a hiatus in the procedure from presenting a complete appeal to the appellate court, he was entitled to a new trial. The same rule is announced in *Whitely et al. v. St. Louis, E. R. & W. Ry. Co.,* 29 Okla. 63, 116 Pac. 165. In the case at bar, however, the plaintiffs could have had the case-made signed and settled by Judge Barnum by fixing the time therefor by serving a notice to that effect prior to his retirement from office. There is no failure in procedure except as it was occasioned by this omission of the parties hereto.

This question has been exhaustively considered by this court, the parties hereto having been permitted to file their second petition for a rehearing, but, after a careful and earnest consideration of this case, we have been unable to reach any other conclusion than that this proceeding in error should be dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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RICHARDSON *et vir* v. BEIDLEMAN *et al.*

No. 2522. Opinion Filed September 11, 1912.

(126 Pac. 823.)

DEFECTIVE CASE-MADE. Same as that in **Richardson et vir v. Beidleman et al., ante,** 126 Pac. 818.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Katie Richardson and James Richardson against George C. Beidleman and others. Decree for defendants, and plaintiffs bring error. Dismissed.

R. M. Dick, J. L. Newhouse, and *F. F. Lamb,* for plaintiffs in error.

Lex V. Deckard and *Eaton, Beidleman & Carter,* for defendants in error.

WILLIAMS, J. Under authority of *Richardson et vir v. Beidleman et al., ante,* 126 Pac. 818, this proceeding in error must be dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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CURTIS *et al.* v. BOARD OF COMMISSIONERS OF SEQUOYAH COUNTY.

No. 2966. Opinion Filed September 11, 1912.

(126 Pac. 719.)

1. **COUNTIES—Bonds—Issuance—Remonstrance.** Section 409, Comp. Laws 1909, contemplates that remonstrances against the issuance of refunding bonds by a county, where the debt to be refunded exceeds the sum of $1,000, shall be heard before the district court. There is no provision of law authorizing such a remonstrance to be heard before the board of county commissioners.

2. **SAME—Review.** Record examined, and held not sufficient to disclose the grounds for a verbal remonstrance to the refunding proceeding, or that the court committed error in overruling the same.

(Syllabus by the Court.)

Error from District Court, Sequoyah County; J. H. Pitchford, Judge.

Remonstrance by W. L. Curtis and others against the issuance of bonds by the Board of County Commissioners of Sequoyah County. From a judgment overruling the remonstrance, the remonstrants bring error. Affirmed.

Curtis & Pitchford, for plaintiffs in error.

T. F. Shackleford, Co. Atty., and *J. B. Allen,* Asst. Co. Atty., for defendant in error.

KANE, J. This controversy arose out of an attempt by Sequoyah county to refund its outstanding warrant indebtedness under article 7 of chapter 8, Comp. Laws 1909, entitled "An act to enable counties, municipal corporations, the boards of education of any city or school districts to refund their indebtedness." It seems that upon the publication of the notice required by section 409 of said statute the plaintiff in error herein, representing various taxpayers, appeared before the board of county commissioners and interposed certain objections to the refunding proceedings, which objections were disregarded by the board of

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county commissioners; whereupon the plaintiff in error appealed to the district court. On the day named in the notice, the officers authorized to issue bonds under section 408 of said statute appeared and made proof to the satisfaction of the court of the existence, character, and the amount of the outstanding legal indebtedness of said county; whereupon the court caused to be made upon the records of said court the statement required by section 410, and proceeded to sign each bond to be issued. When the proceedings came on to be heard in the district court, announcement was made in open court that any interested person or persons might appear and protest, remonstrate, or object; whereupon the plaintiff in error W. L. Curtis, purporting to represent certain taxpayers, entered a verbal protest, which was not made a part of the record, in relation to which the journal entry recites:

"All parties desiring to be heard having been heard, and the court having caused proper announcement, in open court, to be made of the right of any interested person or persons to appear and protest, remonstrate, or object, and verbal protest having been made by Attorney W. L. Curtis, purporting to represent certain taxpayers of said Sequoyah county, in which protest this court finds no reason for disallowing the prayer of the petitioners, and there being no just cause or reason known to the court why said bonds should not be signed and a judgment entered of record, in accordance with the prayer of the petitioners, it is by the court considered, ordered, and adjudged," etc.

The record before us contains all the proceedings had before the board of county commissioners, from which the plaintiff in error appealed to the district court, and all the proceedings had in the district court. The proceedings in the nature of protest filed with the county commissioners not having been presented in the district court as a ground of remonstrance, are not properly a part of the record of the refunding proceedings therein. Section 409, *supra*, contemplates that remonstrances to the refunding proceedings shall be had in the district court. There is no provision authorizing such a remonstrance to be heard before the board of county commissioners.

There is nothing in the record sufficient to inform this court of the nature of the verbal remonstrance filed in the district

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court. All that appears of record is that counsel entered a verbal protest and cross-examined the officers of the county authorized to issue bonds under article 7, *supra,* who were put upon the stand to make the proof required by that article. Admitting, without deciding, that a verbal remonstrance is permissible, still we are unable to gather from anything that appears upon the face of the record proper, or from the cross-examination of counsel, what the grounds of complaint were. True, the petition in error in this court contains sixteen assignments of error, many of which are argued by counsel in their brief; but there is nothing in the record to indicate that any of the questions raised in this court were presented to the court below by remonstrance or otherwise.

As the notice of the issuance of the bonds and the proceedings before the district court seem to be in all respects regular, the judgment of the court below must be affirmed.

TURNER, C. J., and HAYES and DUNN, JJ., concur; WILLIAMS, J., absent, and not participating.

HENRY *et al.* v. BARTLESVILLE GAS & OIL COMPANY.

No. 3480. Opinion Filed September 11, 1912.

(126 Pac. 725.)

MUNICIPAL CORPORATIONS — Natural Gas Corporations— Grant of Franchises. The assignee of the owner of a franchise from a municipality granting to him, his successors or assigns, the right to lay pipes in the streets and supply the inhabitants thereof with gas, brought an action to enjoin H. and his assigns from laying pipes therein for a like purpose, who for answer sought to justify under a like alleged franchise granted by the municipality to them. **Held,** that the court did not err in holding said franchise, because granted to an individual, void and beyond the power of the city to make, and in restraining as trespasses said acts committed pursuant thereto.

(Syllabus by the Court.)

Williams, J., dissenting.

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Error from District Court, Washington County; R. H. Hudson, Judge.

Action by the Bartlesville Gas & Oil Company against Robert L. Henry and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Veasey & Rowland, for plaintiffs in error.

John H. Brennan and *Shea & O' Meara,* for defendant in error.

TURNER, C. J. From a judgment of the district court of Washington county, rendered and entered September 25, 1911, pursuant to the prayer of the petition of the Bartlesville Gas & Oil Co., defendant in error, perpetually enjoining Robert L. Henry and the Henry Gas Company, his assignee of a franchise from the city, alleged to be void, from interfering with the streets, alleys, and highways of the city of Bartlesville, "and from digging therein trenches or ditches for the purpose of laying pipes therein or conveying natural gas through said pipes to serve the citizens of the city of Bartlesville with what is known as domestic service in natural gas, and that the said defendants and each of them be restrained and enjoined from interfering in any way with the plaintiff herein in the enjoyment of its exclusive franchise," and declaring the franchise under which they sought to justify the act complained of to be void, and overruling the petition of the city of Bartlesville to intervene, Robert L. Henry, the Henry Gas Company, and the city of Bartlesville bring the case here.

The record discloses: That on November 20, 1899, the city of Bartlesville granted to William Johnstone and assigns, by Ordinance No. 41, "the right to the exclusive use of the streets, roads, alleys and public grounds of the city of Bartlesville, I. T., for the purpose of delivering natural gas to the inhabitants of said town for a period of twenty years or so long as natural gas is furnished said city in accordance with the franchise," and later, on November 4, 1903, when the same had come into the hands of the Bartlesville Gas & Oil Company, his assignee, the city passed another ordinance entitled "An ordinance amending Ordinance

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No. 41 and granting to the Bartlesville Gas & Oil Company, its successors and assigns, the privilege of laying pipes and supplying the inhabitants of the incorporated town of Bartlesville with gas for fuel and illuminating purposes for a period of twenty years." This was known as Ordinance No. 49. That on April 25, 1911, the board of commissioners of said city passed another ordinance (No. 418), which was submitted to the qualified electors of the city, and was approved by them at a special election held for that purpose on that day. That said ordinance, as thus ratified and approved, purported to grant to Robert L. Henry, of Chicago, Ill., and his assigns, a like franchise, which, prior to this suit, had been assigned by him to the Henry Gas & Oil Company, both of whom were perpetually enjoined, as stated, while digging up the streets and the alleys of the said city for the purpose of laying pipes to furnish gas to the inhabitants thereof under said franchise. The court did not err in so doing, because said franchise was void. This for the reason that no power existed in the city to grant such franchise to an individual, such as was Robert L. Henry.

What is said by Mr. Joyce in his work on Franchises (section 82), as to manufacture and distribution of artificial gas, is equally applicable to natural gas. There he says:

"The manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of public nature, and meets a public necessity for which the state may make provision."

The legislative power of the state has never granted or delegated to the municipalities of the state the power to grant to an individual the franchise of furnishing natural gas to such municipality, or clothed him with the power of exercising the right of eminent domain to enable him so to do. This business of a public nature has been provided for by the state and by it intrusted to domestic corporations only.

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Snyder's Comp. Laws 1909, sec. 4844, in effect, provides that before any gas pipe line corporation shall acquire any right of way, or exercise the right of eminent domain within the state, or construct any pipe lines for the transportation of gas, it shall file in the office of the Corporation Commission a plat showing the points in the state between which its trunk line is proposed to be constructed, etc.

Section 4845 provides that all domestic gas pipe line corporations in this state are authorized to build and operate, and for that purpose to acquire, whether by purchase or the exercise of eminent domain, sites for the erection of pumping stations, etc.

Section 4846 provides:

"Every domestic gas pipe line corporation in this state is hereby given authority to build, construct and maintain gas pipe lines over, under, across or through all highways, bridges, streets or alleys in this state, or any public place therein under the supervision of the inspector of oil and gas wells and pipe lines as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law"

—clearly implying that the local municipalities of the state may grant a franchise, such as the Henry franchise purports to be, to a domestic gas pipe line corporation only. The power to grant such franchise to such corporation excludes the power to grant the same to an individual—in keeping with the maxim *expressio unis,* etc., and the rule that a municipal corporation possesses and can exercise only powers granted by express words, or those necessarily implied in or incident thereto, and that any ambiguity or doubt as to the existence of a power is to be resolved against the corporation, and the power denied. Dill. Mun. Corp. sec. 89. These sections of the statute, we think, are the only ones involved in determining whether such grant of power exists, since those relying upon such grant have failed to call our attention to any other. This being true, the alleged franchise to Henry and his assignees was void; and the acts complained of

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and sought to be justified thereunder were trespasses and properly enjoined.

In *State of New York v. Mayor and Aldermen, etc.*, 3 Duer (N. Y.) 119, the common council of New York passed a resolution granting to one Sharp and others the right, on certain terms, to construct a railroad in Broadway and run cars upon it for carrying passengers. It was vetoed by the mayor, and thereafter the court enjoined him and the aldermen and commonalty of the city from making a grant by passing a resolution. It was passed, however, notwithstanding the mayor's veto and the injunction; and those to whom the grant was made accepted the same in writing in the form prescribed by the resolution, and the grantees were then made parties defendant. From the judgment enjoining them, defendants appealed. In affirming the judgment, the Superior Court held that the grant of the powers, privileges, and immunities conferred by the resolution was the grant of a franchise, and, the municipal corporation being incompetent to make the grant, the making of it was a usurpation of power, and the grant was void, and the grantees, who insisted upon the right to exercise the powers and privileges thus granted, were properly perpetually enjoined.

In *State ex rel. Smythe v. Milwaukee, etc., Telephone Co.*, 133 Wis. 588, 114 N. W. 108, 315, the city of Milwaukee attempted to grant by ordinance a franchise to a telephone company. A suit in *quo warranto* was brought under the statute by a taxpayer of the municipality against the company for usurping a franchise. In passing upon a demurrer to the petition, the court said:

"The attempt to grant, confer and delegate rights and privileges constituting franchises and public functions of the state, whereby rates for services are established, a revenue is to be paid to the city, and other public powers are to be exercised over the subjects above specified, is an act beyond the authority of the city. They pertain to a class of powers which are public in their nature, and which do not belong of common right to persons generally. Such powers can only be exercised under authority from the state"

—and held the franchise void as beyond the power of the city to grant.

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In *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, the common council of the city of Kenosha passed an ordinance granting to Haynes and Clausen, residents of Chicago, Ill., their associates, etc., the right to construct and operate a passenger street railway over certain streets in said city, including the street opposite the plaintiff's premises. The franchise was accepted; and, while attempting, pursuant thereto, to lay a track along the street in front of plaintiff's property, defendants were enjoined as for a trespass, upon the ground that the franchise was void and beyond the power of the city to grant. Following *Linden Land Co. v. Milwaukee, etc., Co.,* 107 Wis. 493, 83 N. W. 851, the court held, "that an abutting lot owner may enjoin the laying of a railway track which is about to be laid, without authority of law, in the street in front of his premises cannot be doubted for a moment," and affirmed the judgment of the lower court holding the franchise void and perpetually enjoining the trespass. Answering objections, in effect, that as defendant claimed a right to do the act complained of under a franchise from the state a court of equity could not inquire as to the validity of that franchise at the suit of a private individual, the court, *inter alia,* said:

"It has, however, never been held that, where one attempts to justify acts by a pretended license or franchise which the grantor had no power whatever to confer, a court, whether of law or equity, cannot discover that fact and deny the claim of justification. It matters not whether such defect of power rests upon the state itself, or upon any of its subordinate agencies attempting its exercise. The readiness of courts so to do has been evinced in many cases in this state and elsewhere. *Sellers v. Lumbering Co.,* 39 Wis. 525; *Sherman v. Railway Co.,* 40 Wis. 645; *Chicago & N. W. Ry. Co. v. Milwaukee, R. & K. E. Ry. Co.,* 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. Rep. 136; *Zehren v. Light Co.,* 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844; *Railroad Co. v. Hood,* 36 C. C. A. 423, 94 Fed. 618; *General Electric R. Co. v. Chicago, I. & L. Ry. Co.,* 39 C. C. A. 345, 98 Fed. 907, 911 [58 L. R. A. 231]; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.,* 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville & N. R. Co. v. Mobile, J. & K. Co.,* 124 Ala. 162, 26 South. 895; *Zanesville v. Gaslight Co.,* 47 Ohio St. 1, 23 N. E. 55."

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The doctrine in *Allen v. Clausen, supra,* was followed by this court in *Tulsa Street Railway Co. v. Okla. Union Traction Co.,* 27 Okla. 339, 113 Pac. 180. There, in the syllabus, we said:

"The owner of a street railway, being operated upon the streets of a city under a franchise which was not exclusive, brought an action to enjoin another company from constructing and operating, without a franchise or authority from the municipality, a street railway upon the streets of said city. The defendant company answered that it was acting under legislative authority granted by ordinance of the city council. *Held,* that the court had power to investigate the facts and determine whether defendant had a franchise, and, if it had an alleged franchise, might determine whether such franchise was invalid, because granted without authority of law."

We are therefore of opinion that the Henry franchise was void for the reason stated, and for that reason the court did not err in restraining the trespass complained of and making the injunction perpetual.

Since no brief is filed by the city in support of the proposition, we will not consider whether the court erred in refusing to permit the city of Bartlesville to intervene. And, not being raised by defendant below by demurrer to the petition on the ground of defect of parties, we cannot consider their objection here at the instance of the plaintiff in error. It is unnecessary to decide other questions sought to be raised.

The judgment of the trial court is affirmed.

HAYES, KANE, and DUNN, JJ., concur; WILLIAMS, J., dissenting.

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CUNYAN v. CLEMMER.

No. 3838. Opinion Filed September 11, 1912.

(126 Pac. 578.)

APPEAL AND ERROR—Case-Made—Delay in Service. A purported case-made, which is not served within three days after the judgment or order appealed from is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

(Syllabus by the Court.)

Error from District Court, Kay County; W. M. Bowles, Judge.

Action between Mike Cunyan and John Clemmer. From the judgment, Cunyan brings error. Dismissed.

W. B. Clark, for plaintiff in error.

W. K. Moore and *L. A. Maris,* for defendant in error.

HAYES, J. This appeal is prosecuted upon petition in error and case-made. On the 28th day of August, 1911, within an extension of time theretofore granted in which to serve a case-made, plaintiff in error was granted by the trial judge, as a further extension of time within which to serve his case, a period of ten days from that date. The case-made was not served until September 8th, which was one day after the expiration of the extended period, and the case-made is therefore void, and the appeal must be dismissed. *Cowan v. Maxwell,* 27 Okla. 87, 111 Pac. 388; *London & Lancashire Fire Ins. Co. v. Cummings et al.,* 23 Okla. 126, 99 Pac. 654; *Bettis v. Cargile et al.,* 23 Okla. 301, 100 Pac. 436.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

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ST. LOUIS & S. F. R. CO. v. RICKEY.

No. 3871. Opinion Filed September 11, 1912.

(126 Pac. 735.)

APPEAL AND ERROR—Case-Made—Delay in Service. A purported case-made, which is not served within three days after the judgment or order appealed from is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

(Syllabus by the Court.)

Error from District Court, Washita County; Jas. R. Tolbert, Judge.

Action between the St. Louis & San Francisco Railroad Company and W. E. Rickey, doing business as the Casebeer Grain Company. From the judgment, the Railroad Company brings error. Proceeding in error dismissed.

W. F. Evans, R. A. Kleinschmidt, and *J. H. Grant,* for plaintiff in error.

T. A. Edwards, for defendant in error.

HAYES, J. Motion for new trial in this case was overruled on October 28, 1911. At that time plaintiff in error was granted an extension of 60 days in which to serve a case-made, 30 days within which to supersede the judgment, and 120 days within which to file its appeal in this court. On December 11, 1911, an extension of time for a further period of 60 days was granted for service of case-made. On February 2, 1912, an order was made granting an extension of 60 days from the date fixed in the original order for filing the case in this court, but no extension of time for service of the case-made was granted. The case-made was served on March 20, 1912.

It follows that, since the case-made was not served within the time fixed by the statute, nor within any extension of time made within the statutory period, the case-made is void, and the

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cause must be dismissed. *Cunyan v. Clemmer*, *ante*, 126 Pac. 578; *Cowan v. Maxwell*, 27 Okla. 87, 111 Pac. 388; *London & Lancashire Fire Ins. Co. v. Cummings et al.*, 23 Okla. 126, 99 Pac. 654; *Bettis v. Cargile et al.*, 23 Okla. 301, 100 Pac. 436.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

EDSON *et al.* v. HEROD *et al.*

No. 3878. Opinion Filed September 11, 1912.

(126 Pac. 577.)

APPEAL AND ERROR—Case-Made—Delay in Service. A purported case-made, which is not served within three days after the judgment or order appealed from is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court.

(Syllabus by the Court.)

Error from District Court, Kingfisher County; James B. Cullison, Judge.

Action between Lulu B. Edson and others and R. C. Herod, administrator, and others. From the judgment, Edson and others bring error. Motion to strike case-made sustained, and proceeding in error dismissed.

D. K. Cunningham, for plaintiffs in error.

F. L. Boynton and *Hinch & Bradley*, for defendants in error.

WILLIAMS, J. On April 25, 1911, the motion for new trial of plaintiffs in error having been overruled, they were given "90 days within which to prepare and serve a case-made for the Supreme Court," defendants in error being given "ten days within which to suggest amendments thereto," and the case-made to be settled upon five days' notice in writing. On January 18, 1912, plaintiffs in error having made application, the time theretofore given them for the purpose of making and serving a case-made

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was extended 60 days, "in addition to the time heretofore allowed." The case-made was served on the defendants in error on April 11, 1912. Motion is now made to strike the case-made from the files, on the ground that it is a nullity, not having been served within time.

It has time and again been held by this court that a purported case-made, which is not served within three days after the judgment or order appealed from is entered, or within an extension of time duly allowed, is a nullity, and cannot be considered by this court. *Cunyan v. Clemmer, ante,* 126 Pac. 578; *St. Louis & S, F. R. Co. v. Rickey, ante,* 126 Pac. 735; *Woods v. Coleman,* 32 Okla. 244, 122 Pac. 234; *City of Wagoner v. Gibson,* 32 Okla. 14, 121 Pac. 625; *Haynes v. Smith,* 29 Okla. 703, 119 Pac. 246.

The record recites:

"And now on this 25th day of October, 1911, * * * and file their motion for a new trial which is by the court heard, considered, and overruled, to which the defendants except. And now the defendants are given 90 days within which to prepare and serve a case-made for the Supreme Court, and the plaintiffs are given ten days within which to suggest amendments thereto, and the same shall be settled upon five days' notice in writing of the time and place thereof."

The plaintiffs in error insist that the 90 days should begin to run from the date of the entering of the judgment on the motion for new trial, and that the record does not show on what date it was entered; that the date of rendition and entering of the judgment are not the same; that as the trial judge afterwards, on January 18, 1912, granted 60 days in addition to that theretofore allowed for serving case-made, and thereafter, on April 24th, signed and settled the same, the presumption is that the motion for new trial was not entered on October 25th, but upon a later date, so that the time given for serving the case-made brought it within the date on which it was served, to wit, April 11, 1912.

It is not essential for the purposes of this case to determine whether the term "entered" means the judicial act of rendition, for it appears from the first order of extension that "now (not

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on the date on which this order is entered, but on this October 25, 1911) defendants (plaintiffs in error) are given 90 days within which to prepare and serve a case-made for the Supreme Court," and that thereafter, on January 18, 1912, "the time heretofore allowed defendants for the purpose of making and serving a case-made * * * is hereby extended 60 days in addition to the time heretofore allowed."

The motion to strike the case-made is sustained, and the proceeding in error dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

INCORPORATED TOWN OF BRISTOW v. CITY OF SAPULPA.

No. 386. Opinion Filed June 25, 1912.

Rehearing Denied September 10, 1912.

(126 Pac. 446.)

1. **COUNTIES—County Seat—Election.** Section 6 of article 17 of the Constitution (paragraph 324, Williams' Ann. Const. Okla.) provides in reference to elections for the permanent location of county seats that, "if a majority of all the votes cast in the county at such county seat election shall be in favor of any town, such town shall thereafter be the county seat." In a contest over an election for the permanent location of a county seat, it was made to appear by the report of a referee that the partisans and supporters of one of the contestants by unlawful and corrupt practices so debauched the electorate of two precincts as to prevent a fair and impartial election, and that by reason thereof the same did not give a fair expression of the will of the people, and as a conclusion of law found that, because of these corrupt practices committed by the partisans and supporters of the said town, it was not entitled to have counted for it the votes it had received therein as shown by the said returns. Approved.

2. **SAME.** It was further found by the referee as a result of the evidence adduced before him that but six votes cast at the said precincts out of a total of 508 were disqualified and illegal because of a lack of statutory qualifications to vote, and that this number shall not be counted as going to make up the total number of votes cast. Approved.

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3. **SAME.** It was further found and reported by the said referee as a conclusion of law that the balance of the votes in the said precincts should not be counted as votes cast because of the fraudulent conduct and illegal practices of the partisans of the said town, notwithstanding said votes were not shown to have been illegal, and also notwithstanding the result of such holding would be to award to the said town the fruits of the fraud committed by its supporters and establish it as the permanent county seat of the said county. Disapproved, because the citizens of a county are constitutionally entitled to have their county seat located by a majority of the legal votes cast, and no contestant for county seat honors will be permitted by unlawful practices and corruption to prevent a fair election and have rejected as illegal a sufficient number of votes, which would otherwise be counted as votes cast, where the same would result in making the votes received by the said town a majority of the balance of the votes cast and counted.

(Syllabus by the Court.)

Original action by the Incorporated Town of Bristow against the City of Sapulpa to contest a county seat election. Report of Charles H. Parker, referee, affirmed in part and reversed in part, and another election ordered.

Hutchings & German and *Du Mars & Vaught,* for plaintiff.

McDougal, Lattimore & Lytle, for defendant.

DUNN, J. This case is an original action in this court brought for the purpose of contesting the result of an election called for the purpose of locating the permanent county seat of Creek county, Okla: The temporary county seat of the said county was fixed by the Constitutional Convention at the city of Sapulpa. On a petition duly filed an election was called and held under the provisions of the Constitution and an act of the First Session of the state Legislature (Sess. Laws 1907-1908, p. 378), on the 12th day of August, 1908. At this election Bristow offered as the sole competing candidate. On the face of the returns the total number of votes cast was 4,221, of which Sapulpa received 2,372, and Bristow received 1,849, giving Sapulpa a majority of 523 votes. These returns were duly certified to the Governor, whose duty under the statute was to canvass the same and declare the result, "and cause the will of the electors to be carried into effect." On this being done, this action was instituted by plaintiff, the incorporated town of Bristow, by filing a

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petition on September 12, 1908, and on the issues made up the cause was referred to Charles H. Parker, Esq., as a referee, and he was directed to take the testimony and report the same to this court with his findings of fact and conclusions of law. Under the authority thus vested, the referee proceeded to hear the cause, and on January 8, 1912, duly filed his report, in which as a conclusion and summary he finds that the total vote cast should be reduced to 3,666, and that Sapulpa's vote should be reduced to 1,973, which being a majority as between it and Bristow, and a majority of the votes held to have been cast in the election, established it as the permanent county seat of the county.

The exceptions filed to the report raise issues to the returns of but three precincts. These are precincts Nos. 8 and 9 at the town of Kiefer, and precinct No. 2 in the city of Sapulpa. On the hearing before the referee in reference to the allegations concerning the conduct of the election at precincts Nos. 8 and 9, located at the town of Kiefer, a large number of witnesses were examined, and from the evidence adduced the referee found that the returns from these precincts should not be counted for any purpose; the finding being to the effect that zealous partisans and supporters of the city of Sapulpa had so far corrupted the electorate in these precincts that their candidate was not entitled to have counted for it the majority of the votes which it had there received, and also that the said corruption was of such character as to destroy the validity of the vote for any purpose, that "it is not a fair and impartial vote and is not a fair expression of the will of the people of those precincts." The referee on this matter speaks as follows:

"The evidence introduced in this case on the hearing before the referee shows that Kiefer is located in the edge of the Glenn Pool and is essentially an oil town, that the population is inclined to be of a shifting nature, and that many persons who work in the Glenn Pool at the different oil wells or engaged in the oil industry live in Kiefer or had Kiefer as their voting place at the county seat election. The evidence shows that it was no uncommon thing for beer, whisky, and other intoxicants to be offered for sale openly with very little fear of apprehension to those selling such intoxicants or any prosecution on account of the violation of the prohibitory law of Oklahoma. The evidence

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shows that certain 'jointists,' persons who were engaged in the illegal sale of intoxicating liquors at the town of Kiefer, were openly and avowedly in favor of the city of Sapulpa in the county seat election. The evidence shows that Kiefer is located four or five miles from Sapulpa, and about sixteen miles from Bristow, and that, before the agitation over the county seat election in Creek county became at all strenuous, certain jointists in the town of Kiefer stated that their natural preference was for the town of Bristow as the county seat for the reason that the officers of the county would be located at a greater distance from the operations of these jointists at Kiefer. That these same jointists, afterwards, when it became known that they were working for and sympathizing with Sapulpa in the county seat election, stated in explanation thereof that certain of the county officers had in effect told them that, if they did not support Sapulpa in the county seat election, they would close up their business. Evidence has been introduced tending to show that several of these jointists who operated joints in the town of Kiefer would receive information in advance when a raid would be made upon their places by officers connected with the sheriff's force, and that, when the officers arrived at Kiefer, the intoxicating liquors which these parties had in their various places would be disposed of and concealed in such a manner that there would be nothing in sight and the officers would return without confiscating any intoxicants on the raid. Evidence has been introduced showing a short time before the county seat election two excursions for the purpose of boosting the city of Sapulpa in the county seat election; one of these excursions being the day prior to the county seat election, and the other excursion being a few days previous to that. Very many of the people who came on these excursions were law-abiding citizens who came down to Kiefer with the perfectly legitimate and praiseworthy object of using what influence they could fairly and honestly to gain votes for the city of Sapulpa, and very many of the people who came on these excursions conducted themselves in an entirely becoming manner, and are not subject to criticism as to any of their actions at the town of Kiefer. But the evidence in your referee's opinion conclusively shows that, while those excursionists were in the town of Kiefer, the different 'joints' or places where intoxicating liquors were sold were wide open, were filled to their utmost capacity by persons who were in Kiefer at the time, and that beer and whisky were given away across the counters in said 'joints' without price; that anybody who wanted to get a drink could get one, and that it was at these different joints the remark was

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frequently made that 'This is Sapulpa's beer,' 'This is on Sapulpa,' or 'Come and drink with Sapulpa.' Not only was this done immediately prior to election, but on election day, beer, whisky, and other intoxicants were to be had in Kiefer for the asking, and sometimes without that formality being required. On these excursions it is shown that the county judge and county attorney were both present, two of the officers who are particularly charged with the enforcement of the prohibitory law in this state. The evidence is conflicting as to whether or not these two gentlemen were in any of the 'joints,' some of the witnesses testifying that they were and some that they were not, that they did not see them in any of the 'joints' in Kiefer, and the two gentlemen in question both testified that they were not in any of the 'joints' at this place, but the evidence introduced on the hearing shows that it was a well-known fact that the prohibitory law was being violated in Kiefer, especially on the occasion of these two excursions from Sapulpa, and the records of the county court were also introduced in evidence showing that there were no arrests made for violations of the prohibitory law on those days. It is also in evidence that both the county attorney and county judge as well as the sheriff of Creek county were sympathizers with Sapulpa, and especially interested in the success of Sapulpa in the county seat contest. Numerous persons have testified that beer, whisky, and other intoxicants were given to them at these 'joints' without any testimony being given that compensation was paid by them therefor. The evidence shows that during election day persons were employed to drive hacks and to bring parties from the oil fields in to Kiefer to vote, and that generally these persons were deposited near one of the 'joints' in the city, and went into the 'joint' before going to the polling place, and, after remaining in the 'joint' for some time, they went to the polling place and voted. * * * Your referee finds from the evidence that many of the inhabitants of Kiefer were not concerned in any manner nor in any way implicated in these actions and were in no wise responsible for any of this conduct, but the fact remains that the different things done at Kiefer by persons who were interested in the success of Sapulpa in the county seat election were such as to very strongly tend to prevent a fair election at Kiefer and to prevent a fair expression of the will of the voters at the two precincts in that town. * * * Your referee finds from the evidence that beer, whisky, and other intoxicants were freely furnished for a short time prior to the election and during the day of election by persons who were sympathizers of Sapulpa to any person who desired to partake

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of the same in Kiefer, and that such beer, whisky, and intoxicants were furnished for the express purpose of influencing the vote for the town of Sapulpa and against the town of Bristow, and that by reason of the action of persons engaged in an unlawful pursuit in the town of Kiefer, and by reason of the actions of their tools and henchmen, the vote had in the town of Kiefer at this election is not a fair and impartial vote, and is not a fair expression of the will of the people of those precincts."

It is not found that Bristow had anything to do with bringing about this condition. The conclusion of law of the referee on these facts was:

"By reason of the fraudulent and illegal acts committed in connection with and prior to the election therein, that none of the votes cast in these two precincts can be counted for either town, nor can they be counted in estimating the number of votes cast at this election, but should be excluded from any consideration herein."

Section 6, art. 17, par. 324, Williams' Ann. Const. Okla., provides in reference to the location and removal of county seats that, "if a majority of all the votes cast in the county at such county seat election shall be in favor of any town, such town shall thereafter be the county seat." The report of the referee discloses that there were cast in the said election 22 illegal votes which could not be counted for any purpose by reason of the fact that the parties who had cast them lacked the qualification of electors. Six of this number were cast at the precincts in question, and 25 in addition thereto were willfully exposed ballots, which, under the authority of the case of *Town of Eufaula v. Gibson et al.*, 22 Okla. 507, 98 Pac. 565, were incompetent to be considered as a part of the votes cast. Deducting this number from the total vote as shown by the returns leaves a balance of 4,174 votes cast. There was cast at the precincts in question for both parties a total of 508 votes, which, with the 47 illegal votes, made a total of 555 votes which the referee deducted from the total vote cast of 4,221, leaving as a total number of votes to be counted as votes cast the sum of 3,666. From the total number of votes cast for Sapulpa there should be deducted 399 votes made up of the votes which Sapulpa received in precinct No. 8, 140, and precinct No. 9, 234, and 25 exposed ballots

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in precinct No. 2, Sapulpa, leaving it with a total of 1,973 votes to its credit, which was a majority of the votes cast, and 124 votes more than was received by Bristow after the deductions had been made, if the conclusion of the referee is accepted. The question here presented, therefore, is: Should the votes, aside from the six illegal ones which were cast at these two precincts, be deducted from the total vote received by Sapulpa, and yet be counted as votes cast? If deducted from Sapulpa's vote and yet counted as votes cast, there would be left to the credit of either of the towns less than the constitutional majority to constitute a valid election. It is a presumption accompanying all ballots that they are valid, and that the parties who cast them are qualified. The referee, with the returns from these precincts before him, investigated the same to the extent of ascertaining that six of the voters thereat were not qualified by reason of a lack of residence. These manifestly should not, as they were not, be counted for the party for whom cast, nor as a part of the total vote cast. The balance of the votes cast at that election were not rejected for the reason that these six were, nor for anything akin to it. It is not asserted, or claimed by either of the parties or found by the referee, that the balance of the electors who cast their ballots at these precincts were not qualified electors of the county by reason of a lack of any of the statutory or constitutional qualifications, but it is found that the votes cast by them should not only not be counted for Sapulpa because of the corruption perpetrated by its partisans and supporters in the election, but that the effect of the unlawful acts done was so far-reaching and insidious, and the extent of the "fraudulent and illegal acts" such, that the vote was not "a fair expression of the will of the people," totally destroying the result declared for any purpose of the election. In this conclusion of the referee we are able to but partially concur. It is fundamental that none should reap a benefit from his fraudulent and illegal acts. It is fundamental, if the partisans and supporters of a contestant in a county seat election so far corrupt the electorate that it will on detection be properly denied the benefit of the votes thereby received, that it ought not to be permitted to attain the same end

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by having the entire vote rejected because of its fraud, where the direct result will be to award to it the fruits of its wrongs. Of what avail would it be to deny the defendant in this case the votes which its partisans had fraudulently secured for it, and at the same time reject the entire election at these precincts because of this same fraud, where the result would be the same as counting the illegally secured votes? We can see no distinction. In either event the result sought is attained and is identical. A contest for a county seat under the constitutional provision obtaining in this state presents a different character and grade of election from that which is held for the selection of public officials, for this is presumed to determine a grave question permanently, while the other recurs at brief intervals and in its very nature is of less consequence. The question is of momentous importance, not only to the particular places competing, but to every citizen, elector, and taxpayer in the county, and the Consitution guarantees to them all the right of having the county seat located by a majority of the votes cast in the county, and no contestant nor any one else has a right to so far corrupt a number of the electors as to result in thwarting the carrying out of the intent of this constitutional provision. If the conclusion reached by the referee in this cause were permitted to stand and the defendant allowed to achieve success by a decree denying to the votes cast at the precincts in question consideration as votes cast in the county, then a simple, easy method is afforded for any thrifty and unscrupulous competitor for county seat honors which is so inclined to defeat the will of the majority, and secure the county seat in any contest. It is well known that electors residing in territory tributary to a contestant usually support it. They usually want the county seat near them. To achieve success, the adversary could invade this territory on election day, and by fraud, bribery, intimidation, and by the use of intoxicating liquors, or otherwise, bring about such a condition as to cause the rejection of the returns, not only as to the few votes which it might perhaps receive, but perhaps did not expect in this unfavorable territory, but by having the votes rejected as votes cast, so reduce the number of votes cast in the

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county as to enable it with a pronounced minority to show a real majority of the votes cast and counted. This hypothesis is perhaps not a likely one, but the correctness of many rules are determined by not only what has been done under them, but what may be done.

In the case of *Ryan v. Waurika,* 29 Okla. 655, 119 Pac. 220, it appeared that Waurika raised $13,000 by popular subscription to be expended by its committee in the county seat campaign; that all evidence concerning its expenditures was purposely destroyed, or no account kept; that neither the executive committee nor any witness on the stand could or would tell how any considerable portion of said sum was expended; that partisans of Waurika just prior to the election caused a large number of negroes to be detained in the town for the purpose of voting them, said committee furnishing them free board and amusement; that three different gangs of transient railroad laborers were brought from a distance and voted; that of the 115 men employed on a ditch in the town and voted it was impossible to tell how many of them voted legally, or how many were paid $2 by one of said committee, ostensibly for their day's work, but really for their vote; that all known voters thus paid were paid on written order given to each, only one of which was introduced in evidence, which was No. 203; that the challenger, watcher, and poll book holder were excluded from the polls by the election inspector contrary to law; that the voters were rushed through the voting booth in blocks of five and at an unusual rate of speed; that partisans of Waurika with large sums of money, a part of the popular subscription, with the knowledge and consent of the executive committee, visited other voting precincts in the county on election day and spent it in influencing votes for Waurika. It was held that this was ample to sustain the finding of the referee that it was impossible to tell how much money was spent by Waurika in furthering her candidacy for the county seat for legitimate, and how much for illegitimate, purposes, and that the fraud disclosed was sufficient to destroy the value of the returns as evidence and justified the referee in so holding in effect, and in setting the same aside and proceed-

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ing to purge the poll. And thereupon the contesting towns entered into a purge of the poll and each town claiming the benefit of any of the votes was required to prove them. On the rejection of the returns in these precincts, neither party offered to make a purge of the poll, and, indeed, it is doubtful from the character of the influences which were brought to bear whether a satisfactory purge could have been made.

In the case of *Tecumseh et al. v. Shawnee et al., post,* 126 Pac. 440, likewise a county seat contest, this court again held on a rejection of the returns the burden to be upon the city claiming to have been selected at the election as the county seat to show that fact by evidence outside of the returns. In that case it appeared that one city offered its city hall for courthouse purposes for a period of ten years for $100, when it was in fact worth $30,000, that it collected and spent $20,000, of which no record was kept, which was intentionally handled in such a manner that to whom it was paid or for what purpose could not be ascertained from any record; that from the manner in which the said fund was handled it was impracticable, if not impossible, to determine the extent of its corrupt influences upon the electorate of the county, and that by reason of this fraud and corruption the result of the election was left in inextricable doubt, and that the will of the uncorrupted voters of the county could not be ascertained from the returns of the election.

In each of the foregoing cases, for the reasons assigned therein, the election was held to have failed in a choice, and in our judgment this, under all of the circumstances presented, should be our holding in the case at bar, for the votes cast at Kiefer, aside from the six mentioned as being illegal, should have been counted as votes cast, which leaves both towns without a sufficient majority.

This holding is one which must appeal to all as being just. It does not result in foreclosing the matter, but leaves it open for another election which may be held free from the objectionable features of this one. It gives the electorate of the county an opportunity to vote again on this important question, at which election the mistakes made in the first one may be avoided. To

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accomplish this result the court is justified in so construing the provisions of the election laws that the real voice of the people may be honestly heard and recorded, and that it may not be thwarted by the unlawful practices of any one.

The conclusion which we have reached on this point relieves us of the necessity of considering and deciding the questions raised as to precinct No. 2 in the city of Sapulpa. The statutes of the state in conjunction with the recent decisions of this court on these questions ought to render the duty of the election officials sufficiently clear as to relieve the next election of a repetition of the grounds for complaint which appear in this one

It follows, therefore, that, as neither town received the requisite majority of all the votes cast, another election should be called pursuant to the prayer of the petition already filed upon which the election was called, pursuant to section 6 of article 17 of the Constitution, at which election these same towns are to be candidates and the town receiving a majority of the votes cast at such election shall be the county seat of Creek county.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

CITY OF TECUMSEH *et al.* v. CITY OF SHAWNEE *et al.*

No. 697. Opinion Filed May 14, 1912.

Rehearing Denied September 10, 1912.

(126 Pac. 440.)

1. **COUNTIES—County Seat Elections—Bribery.** An offer of the mayor and city council of a city that is a candidate for designation as a permanent county seat at an election for that purpose to lease to the county for courthouse and jail purposes for a period of ten years the city's city hall at a rental of $10 per year, when the rental value of said property is $3,000 per year, which is made to induce voters to vote for said city at the election, constitutes, by reason of section 7, art. 17, of the Constitution, bribery.

2. **SAME—Effect on Election.** Where the municipal authorities of a city which is a candidate at a county seat election for the selec-

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tion of a permanent county seat of a county, for the purpose of influencing votes in favor of said city, offer the use of its city hall to the county for courthouse and jail purposes for a period of ten years for $100, when the rental value thereof for said period of time is $30,000, and such offer is circulated throughout the county by the supporters of said city by circulars, handbills, and newspapers; and a large number of the voters in different parts of the county become interested therein and visit the city at their own expense, or at the expense of its supporters, and inspected the building; and it is shown that said proposition was urged throughout the campaign prominently as a reason why said city should be selected as the county seat; and where the supporters of said city by voluntary subscription raised a fund of more than $20,000, no record of the expenditure of which was kept; and it was intentionally handled by the disbursers thereof in such a manner that to whom it was expended and for what purposes expended could not be ascertained from any record; and it could not be determined what part of it was spent legitimately and what part illegitimately; and it is shown that a large number of voters to wit, 61 in number, in different parts of the county, were bribed with part of said money to vote for said city, and that some of the election officers participated in said fund; and it is impracticable, if not impossible, on account of the way in which said money was handled, to determine the extent of its corrupt influence upon the electorate of the county; and where, by reason of the foregoing fraud and corruption, the result of the election is inextricably in doubt, and the will of the uncorrupted voters of the county cannot be ascertained from the returns of the election—said returns should be held for naught, and the burden held to be upon said city claiming to have been selected at such election as the permanent county seat to show such fact by evidence **aliunde** the returns.

(Syllabus by the Court.)

Original action by the City of Tecumseh and others against the City of Shawnee and others to contest a county seat election. Report of referee in favor of contestants affirmed.

Robert Wheeler, G. A. Outcelt, McClain Taylor, Dale, Bierer & Hegler, Claude Weaver, and *W. A. Ledbetter,* for plaintiffs.

B. B. Blakeney and *J. H. Woods,* for defendants.

HAYES, J. This action is an original action brought in this court by plaintiffs to contest a county seat election. After issues were joined the cause was referred to a referee to report his findings of fact and conclusions of law, which he has done, and the cause is now before us upon exceptions to the report of the referee. The general recommendation of the referee

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is that a judgment be rendered annulling the returns of the election contested.

Numerous specific findings of fact are made in the report. We shall, however, except where we deem it important to quote the language of the report, state the facts substantially as found therein. The city of Tecumseh, one of the plaintiffs, was by the Constitution designated the county seat of Pottawatomie county. Article 17, sec. 8kz, Constitution. On the 10th day of February, 1909, there was held in that county an election to determine the permanent location of the county seat therein. At that election the candidates were the city of Tecumseh and the city of Shawnee; the latter being one of the defendants in this action. As shown by a certificate of the Secretary of State, as authorized by section 6, art. 17, of the Constitution, the city of Tecumseh is about two and one-half miles from the geographical center of Pottawatomie county, and the city of Shawnee is more than six miles therefrom. By reason of these facts, in order to locate the permanent county seat at the city of Shawnee, it was necessary that that city obtain 60 per centum of the total votes cast at the election. Section 6, art. 17, Const. By the returns of said election it is shown that the city of Tecumseh received 3,026 votes cast at said election, and that the city of Shawnee received 4,948 votes, and that there were twenty mutilated ballots cast and not counted for either of the candidates.

No question is raised at this time upon the pleadings, and it is unnecessary to state here their contents, further than that the grounds of contest relied upon are bribery and irregularities in the conducting of the election in certain precincts of the county.

On the 15th day of December, 1908, the mayor and city council at a regular meeting made by resolution the following proposition to the county:

"Be it resolved by the mayor and councilmen of the city of Shawnee: That in the event the county of Pottawatomie, state of Oklahoma, shall within twelve months from this date desire to lease from said city of Shawnee the city hall of said city, for the purpose of courtrooms and county offices and jail, that the mayor and city councilmen will lease the same to Potta-

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watomie county for the period of ten years at an annual rental of ten dollars per year."

Thereafter, on the 21st day of January, 1909, a bond was executed by 96 citizens of the city of Shawnee, including, among the number, many of the most prominent and financially responsible residents of the city. This bond, after setting out the foregoing resolution of the city councilmen and mayor of Shawnee, is conditioned as follows:

"That we, the undersigned, are held and firmly bound unto the county of Pottawatomie, in the state of Oklahoma, in the sum of twenty-five thousand ($25,000) dollars, well and truly to be paid, and for the payment of which we hereby bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents. Dated this 21st day of January, 1909. The conditions of this obligation are such that: Whereas, the city of Shawnee by and through its mayor and councilmen has submitted the above proposition to Pottawatomie county in writing, which proposition as above set out is made a part of this bond. Now, therefore, if the said city of Shawnee shall well and truly comply with each and every condition of said proposition for the period of ten years, this obligation becomes null and void, otherwise to remain in full force and effect."

The foregoing resolution and bond were thereafter submitted to the board of county commissioners, who passed a resolution rejecting the same.

The tenth finding of fact is as follows:

"That after the passage of this resolution of the mayor and councilmen of the city of Shawnee, and the execution of the undertaking and the action of the board of county commissioners, rejecting these offers on the part of the county, the city of Shawnee, through its chamber of commerce and campaign committee, acting in behalf of said city as a candidate for the county seat, sent its representatives and agents into all parts of said county, for the purpose of inducing the voters to visit the city of Shawnee, and procured large numbers of them to make such visit, and exhibited the building described in their resolution generally to the voters of the county making such visit, and actively circulated and published, by handbills and newspaper publications, throughout the entire county, the offer contained in such resolution, and arguments setting forth the

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advantages that might be derived by the county from an acceptance of this offer."

In his eleventh finding of fact the referee finds that the city of Tecumseh also sent representatives and agents generally throughout the county and gave general circulation of the resolution of the board of county commissioners rejecting the offer of the city of Shawnee.

The twelfth finding of fact is as follows:

"The resolution adopted as aforesaid by the mayor and council of the city of Shawnee, and the undertaking executed by a large number of its citizens, hereinbefore set out, were put forth, made and published on the part of the representatives of the city of Shawnee, in the campaign, for the purpose of influencing the voters of the county in this election."

By the thirteenth finding, it is found that the circulation made by the city of Tecumseh of the resolution of the board of county commissioners was for the purpose of counteracting the influence of the resolution and bond made and circulated by the city of Shawnee, and as an argument to influence voters in favor of Tecumseh.

The fourteenth finding is as follows:

"The publication and circulation of the Shawnee resolution and undertaking were so general and energetic throughout the campaign on the part of the adherents of Shawnee that, in my judgment, they did exercise an influence throughout the county in favor of Shawnee upon a portion of the electorate, the exact number and the extent of which is not disclosed in the evidence, and it would be impossible for me, upon the record before me, to determine."

The referee also finds upon the evidence before him that fifteen voters, whose names he sets out in the report, were influenced to vote for Shawnee by reason of that city's offer of its city hall to the county for courthouse purposes.

By the twenty-third finding he also finds that at the beginning of the campaign there was subscribed and contributed by the supporters of the city of Shawnee a campaign fund of more than $20,000; that this fund was put into the hands of campaign directors and workers principally in currency; that "it was understood between the campaign committee, workers, and con-

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tributors of the fund that no record should be kept of the amount of funds contributed, no vouchers taken for items disbursed, and no account made by the persons in whose hands the money was intrusted to any one. It was the purpose and intention of the persons who were actively in charge of the campaign in behalf of Shawnee to so handle the use of this fund that it would be impossible or impracticable to trace or determine either its source or ultimate use."

He further finds that, because of the manner in which the fund was handled, no evidence was introduced or could be obtained as to how the same was disbursed, except the parol testimony of the persons actively engaged in the management of the fund.

He finds as to the disbursement of it as follows:

"From this character of evidence it appears that the fund was distributed lavishly and carelessly to a degree, to say the least, surprising. One hundred and nineteen (119) voters for Shawnee appear to have participated in this fund in amounts ranging from $800 to 50 cents. Negro voters at the village of Earlsboro, and also at McCloud, were paid freely from this fund, some before and some after they had voted. In these precincts and in several others the negro vote was large, and while the evidence does not show, and from the intrinsic nature of the transaction cannot show the precise extent to which this vote was influenced by money, my opinion is, from the whole evidence on this subject, that the negro vote was generally corrupted. Many negroes the day of the election, or shortly before it, were brought into the city of Shawnee from Seminole county by persons working for the interests of Shawnee to vote. Their transportation and expenses were paid by persons interested on behalf of Shawnee, but I cannot find from the proof whether any of these voted, or, if so, how many. Several of the persons who participated in the fund were in different capacities election officers; some of them were counters, some clerks, some judges and one a special election commissioner."

To the contention of the persons who disbursed this fund, and of some of those who received it, that it was designed merely to compensate persons who polled the different precincts and persons who furnished transportation and entertainment for

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voters who were in favor of Shawnee, for their trouble and expense, the referee found:

"I cannot find a fund so large could reasonably be used for these innocent purposes, and I must find from the evidence that it was the intention of the supporters of Shawnee to influence the electorate corruptly by paying to supposed leaders considerable sums of money for their influence and support, and permitting smaller sums of money to be distributed among the voters themselves as a direct bribe. While I cannot find from the proof how far the influence of this corruption extended, or all the specific votes affected thereby, or the number thereof, it is certainly true that so large a fund handled in the way that it was did, to an important extent, debauch the electorate of the county, and destroy the purity and fairness of the election."

The referee, however, did find specifically from the evidence that 61 persons, whom he names in his report, were by the use of said money bribed to vote for the city of Shawnee. He also finds that five persons who were not qualified voters voted for Shawnee. Upon the foregoing facts, he finds as a conclusion of law that the fairness and integrity of the election had been so far destroyed that the result thereof is inextricably in doubt, and that the returns of the election cannot be relied upon to show the free, honest, and uncorrupted will of the people, and that the returns of the election should therefore be annulled, and he recommends that judgment of the court be accordingly.

There is but little exception taken by defendants to the findings of fact by the referee. It is first objected that the finding quoted above to the effect that it was understood between the campaign committee and contributors of the fund that no record should be kept of the amount of the fund contributed, no vouchers taken for items disbursed, or other record made of the expenditure of this money, is not supported by the evidence. Upon examination of the record, we are unable to find evidence to establish that the contributors to this fund had an understanding with the workers and the persons immediately in charge of disbursing the same that it should be handled in the manner found by the referee; but the evidence does clearly establish that there was an understanding between the active workers in behalf of Shawnee and those immediately in charge of this fund and the

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disbursement thereof that no record should be kept of it, and that it should be so handled that there would be no written evidence as to whom or for what it was disbursed, and, thus modified, the finding should stand, and the error committed by the referee is of no material consequence, in so far as it affects the application of law to the facts in this case.

It is also objected that there is no evidence to support the finding of the referee that many negroes on the day of the election or shortly before were brought into the city of Shawnee from Seminole county to vote by persons working for the interest of the city of Shawnee. This finding, we think, is also unsupported in part by the evidence. There is evidence to the effect that negroes were brought into Shawnee from Seminole county, but they were brought by a resident of Seminole county for the purpose of selling their votes to the supporters of Shawnee, and an effort in that direction was made, but without result; and it is not shown that the person bringing said negroes into Shawnee was employed by Shawnee or its supporters or interested in the matter in any other way than in the profits he thought he would derive from a sale of the votes. The evidence does not disclose that any of these negroes voted, and the referee's report should be modified also to this extent. But, as thus modified, we think that the facts found by the referee are sufficient to authorize and justify the recommendation for judgment made by him.

It is not shown that the twenty mutilated ballots cast were not cast by qualified voters, or that the voters casting same did not make an honest but an ineffectual effort to cast a fair and intelligible ballot in accordance with the requirements of the law. Said ballots, therefore, should be considered in determining the total number of votes cast at the election. *Town of Eufaula v. Gibson et al.*, 22 Okla. 507, 98 Pac. 565. Including the mutilated ballots, it is shown by the returns of the election that 7,994 votes were cast, from which should be deducted the five votes cast by persons not legally qualified to vote, leaving a total of 7,989 votes cast at the election. Of this number it was necessary for the city of Shawnee to secure 4,794 in order

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to be chosen the permanent county seat. Deducting from the number of votes shown by the returns of the election to have been cast for Shawnee the five votes cast by persons not qualified to vote, the sixty-one votes cast by persons found to have been bribed for a money consideration, and the fifteen votes cast by persons who were influenced by the proposition of the city of Shawnee to furnish its city hall for courthouse purposes, leaves a total vote for Shawnee of 4,867, or 73 votes in excess of 60 per cent. of the total votes cast; and it is contended by defendants that upon these facts the returns of the election should not be annulled, but that it should be decreed that the conclusion of law and the recommendations of the referee be set aside, and that Shawnee was selected as the permanent county seat. It is our opinion that this contention should not be sustained.

It is first urged by defendants that the offer of the city authorities of Shawnee to furnish the city hall for courthouse and jail purposes for a period of ten years for a nominal rent is not bribery. This question, we think, is concluded against defendants by a decision of this court in *Town of Grove v. Haskell et al.*, 24 Okla. 707, 104 Pac. 56. Section 7, art. 17, of the Constitution, provides as follows:

"Any person or corporation offering money or other thing of value, either directly or indirectly, for the purpose of influencing any voter for or against any competing town in such election, shall be deemed guilty of bribery."

This section has reference to towns competing in elections for the location of permanent county seats, and the same language was enacted into a statute at the first session of the Legislature. Comp. Laws 1909, sec. 885. In *Town of Grove v. Haskell, supra,* it was held that an offer by the supporters of a place that was a candidate in a county seat election to furnish to the county without expense to it a tract of land on which to build a courthouse and jail, and that they would build or cause to be built a courthouse, without expense to the county, and would rent the same to the county for less than the present courthouse and jail, constituted bribery, and that votes obtained by reason thereof were illegal and void, and should not be counted. The city hall in

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the instant case is found by the referee to be of the value of $30,000 and to have a rental value of $3,000 per year. Under the offer of the city authorities of Shawnee the use of this property was to be given to the county for a period of ten years for $100; or, in other words, these authorities were offering as an inducement to secure votes to locate the county seat at Shawnee rents in the sum of $29,900. It is true that this offer was made to no certain person or persons, but was offered as a gift to the county from which the entire taxpaying public would receive a benefit, in the event of the selection of the city of Shawnee as the county seat, because the right to use this building would render it unnecessary to rent or build a courthouse and jail at the expense of the taxpayers. That such offers are not, under the statutes of most states, held to constitute bribery or to contravene their public policy, is recognized in *Town of Grove v. Haskell et al., supra.* But it was said in that case:

"By this provision (referring to the foregoing constitutional provision) it will be noted that Oklahoma has specifically declared to be bribery the doing of the things which, in the absence of such statute or constitutional provision, the other states referred to have held did not under their laws constitute bribery."

It is contended by defendants that nothing of value was offered by the authorities of Shawnee, and that, if there was, such act of the authorities of the city of Shawnee could not constitute bribery, because the same was *ultra vires* and void, and that this fact must have been apparent to the voters upon the face of the offer. We do not think, in view of the construction heretofore given to the constitutional provision and statute applicable to this question by this court, which we now see no reason to depart from, that this contention should be sustained. Assuming the acts of the mayor and city council to be *ultra vires,* it still does not result that nothing of value was offered, or that the voters who were influenced by the offer to vote for Shawnee would not receive the benefit of the offer. The voters may have believed that the want of power in the city authorities to make the contract would never be contested by any one. The offer had the moral support of the citizens of Shawnee. Many of its most

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prominent and responsible citizens executed a bond that the offer of the city would be carried out. The referee finds, and there is an abundance of testimony to support his finding, that this offer did influence voters to vote for Shawnee, and that such influence was so extensive and general throughout the county that it is impracticable, if not impossible, to ascertain the extent thereof. That which the authorities of the city offered, to wit, the use for a period of ten years of the city hall, was a thing of value. If an offer of something of value to influence voters is to be declared not bribery because it cannot be enforced against the person offering same, then this statute and every other statute defining a mere offer to give something of value to be bribery would be rendered nugatory, for every offer to bribe is void and unenforceable.

In *Bush v. Head,* 154 Cal. 277, 97 Pac. 512, the successful candidate at an election, in order to induce persons to vote for him, had promised that, if elected to the office, he would not qualify or accept said office, and that thereby the office would be left without an incumbent, and that the county would be saved the expense of the salary of such officer. On a contest by the losing candidate it was held by the court that such an offer constituted bribery under a statute which made it unlawful for any person directly or indirectly to contribute any money or other valuable consideration to or for any voter, or to or for any person, to induce such voter to vote or refrain from voting at an election, or to induce any voter to refrain from voting for any particular person, and it was held that, although such vacancy could be filled by appointment, such offer having been made to the voters and acted upon by them in that they were induced to vote for the candidate making the offer, it constituted a violation of the statute, and invalidated the election. See, also, *State v. Malo,* 42 Kan. 54, 22 Pac. 349.

The offer of the authorities of the city of Shawnee was extensively circulated throughout the entire county, and brought generally to the knowledge of the voters. That such offer would confer upon the taxpaying public of that county a pecuniary advantage was the belief of some of the voters and acted upon

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by them is established by the evidence. To hold now that such offer does not constitute a violation of the constitutional provision and statute would be to give these provisions a too narrow and technical construction. It was the purpose of the lawmakers to secure the selection of the permanent county seats of the counties of the state to be made solely upon the merit or the suitableness of the candidates therefor, without reference to any temporary advantages that might be offered in the way of bonuses, given by the candidates or the supporters thereof. By offering large sums to the public in the way of courthouses or the payment of other expenses ordinarily borne by the county, a town, far less suitable as a location for a permanent county seat, less accessible to the public who must transact business thereat, might secure its selection solely by the temporary advantages offered to the present generation of taxpayers, and thereby impose upon the future generation of taxpayers and residents of the county who must transact business at the county seat the burdens of an unwise selection when considered without reference to the temporary advantages.

In *Town of Grove v. Haskell, supra,* it was held that votes obtained by offers made in violation of this provision are void, and should be excluded. The question in that case arose upon an allegation of plaintiff's petition that the unlawful offers made in that case induced 100 persons or more to vote for the candidate in whose behalf the offers were made; and it was determined by this court that such allegation stated a cause of action. The majority received by the prevailing party in the election involved in that case was 98 votes. Upon the authority of that case, it is insisted by defendants that the unlawful offer made in the present case should operate only to exclude the votes shown by plaintiff to have been influenced thereby, and not to annul the returns of the election. The facts of this case present a question not presented in the Grove case. While the referee has been able to find from the evidence certain persons, fifteen in number, were influenced to vote for Shawnee solely by this unlawful offer, he also finds that this does not represent the entire result of this corrupt influence upon the

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electorate of the county, and that from the very nature of this influence the exact extent thereof is impracticable or impossible to ascertain from the evidence before him, but that it is such as to render the result of the election inextricably in doubt, and that the returns of the election cannot be relied upon to show the free and uncorrupted expression of the voters. It is shown that advantages of the unlawful offer were emphasized by the supporters of the city of Shawnee throughout the campaign preceding the election, and that the public became interested therein, for a large number of people voluntarily, some of them at their own expense and others at the expense of the supporters of Shawnee, visited the city of Shawnee and investigated the offer that had been made. Bribery at all times is an offense difficult to establish because it is a character of violation of the law which may be consummated without being observed by any one except the participants in the crime; but, as defined by most statutes, there are always at least two persons who witness the commission or have knowledge of any act of bribery, to wit, the offerer of the bribe and the acceptor. But the violator of the law here involved may reap the benefits of his unlawful act without even being brought into contact with the acceptor of his offer. He may publish his offer broadcast, circulate it freely among the electors, as was done in the case at bar, and the voter induced thereby cast his vote in favor of the candidate for which the offer is made without danger of anyone's knowing it, except the voter so influenced. From the very nature of the transaction, proof of the acceptance and the extent of the influence of such an offer is impracticable, if not impossible; for the only direct evidence by which it can be established must come from the person who acted upon the unlawful offer and who feels and is secure from discovery, and, except in rare instances, would therefore be slow to confess himself party to such offense, because he knows that he alone possesses knowledge of the fact sought to be established.

It is true that the board of county commissioners, some time prior to the election, by resolution rejected the offer of Shawnee, but the offer was not withdrawn; nor did the rejection

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of it by the board of county commissioners before the election foreclose the county from receiving its benefits, for it could be acted upon after the election, and the evidence establishes since the election Shawnee has shown itself ready and willing to carry out its offer, and renewed its proposition to make the lease proposed before the election. Added to the foregoing fraudulent acts of Shawnee and its supporters is the further important fact that among its residents there was raised by popular subscription more than $20,000, which was expended by a committee in such manner as to effectually conceal the way and for what purposes it was spent. That some of it was spent for unlawful purposes is established by the finding of the referee of the direct purchase of 61 votes; and there is evidence in the record tending strongly to show that other voters were influenced corruptly by the expenditure of this money. Some of the officers who assisted in holding this election participated in this fund. That some of it was legitimately spent the evidence establishes. That some of it was illegitimately spent is equally well established. What part was spent legitimately and what part illegitimately cannot be ascertained from any record of the transactions of those charged with disbursing this fund, for no record thereof was kept. Discussing a very similar state of facts and the effect thereof upon the returns of the election, this court, in *Incorporated Town of Ryan v. Town of Waurika,* 29 Okla. 655, 119 Pac. 220, said:

"It is sufficient to say that proof that Waurika in mass meeting assembled appointed an executive committee, one of whom served as judge of election at the Waurika box, and testified that he had been a participant in at least twenty county seat fights; that said town raised $13,000 by popular subscription to be expended by said committee in the county seat campaign; that all evidence concerning its expenditure was purposely destroyed, or no account kept; that said executive committee and no witness on the stand could or would tell how any considerable portion of said sum was expended; that partisans of Waurika just prior to the election caused a large number of negroes to be detained in the town for the purpose of voting them, said committee furnishing them free board and amusement; that three different gangs of transient railroad laborers

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were brought from a distance and voted; that of the 115 men employed on a ditch in the town and voted it is impossible to tell how many of them voted legally, or how many were paid $2 by one of said committee, ostensibly for their day's work, but really for their vote; that all known voters thus paid were paid on written order given to each, only one of which was introduced in evidence and was No. 203; that the challenger, watcher, and poll book holder were excluded from the polls by the inspector contrary to law; that the voters were rushed through the voting booth in blocks of five, and at an unusual rate of speed; that partisans of Waurika with large sums of money, a part of the popular subscription, with the knowledge and consent of the executive committee, visited other voting precincts in the county on election day, and spent it in influencing votes for Waurika—was ample to sustain the finding of the referee that it was impossible to tell how much money was spent by Waurika in furthering her candidacy for the county seat for legitimate and how much for illegitimate purposes, and that the fraud disclosed was sufficient to destroy the value of the return as evidence, and justified the referee in so holding in effect, and in setting the same aside and proceeding to purge the poll."

Authorities cited to support the conclusion there reached are equally applicable to the case at bar. In this case, in addition to the use of a large amount of money generally throughout the county to purchase and influence votes as was done in the Ryan case, there is the unlawful act committed by the authorities of Shawnee in offering the use of its valuable property for a nominal sum to the county for a long period of time, and we think the referee correctly found that sufficient fraud has been shown to destroy the value of the returns as evidence to show the choice of the uncorrupted electors of the county, and that the burden was shifted to the defendants to show by evidence *aliunde* the returns, if it can be done, that it received the necessary per cent. of the honest, uncorrupted votes cast to select it as the county seat. This it did not undertake to do; and, for these reasons, it follows that it should be declared that no choice was made by the election.

Since it is not shown that either city received the requisite portion of all the votes cast to select it as the permanent county seat of the county, under the rule announced by this court in

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Incorporated Town of Ryan v. Incorporated Town of Waurika et al., supra, and *Incorporated Town of Westville v. Incorporated Town of Stilwell et al.,* 24 Okla. 892, 105 Pac. 664, another election should be called by the Governor, at which the city of Shawnee and the city of Tecumseh only are entitled to be candidates; and the candidate receiving at such election the percentage of the votes required by the Constitution to select it as the permanent county seat shall be the county seat of Pottawatomie county.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

ST. LOUIS & S. F. R. CO. v. SPARKS *et al.*

No. 836. Opinion Filed May 9, 1911.

Rehearing Denied September 11, 1912.

Error from Grady County Court;
N. M. Williams, Judge.

Action by J. F. Sparks, Tom Peery, and John Sacra, doing business under the firm name of Sparks, Peery & Sacra, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded with directions.

W. F. Evans, R. A. Kleinschmidt, and *W. C. Mitchell,* for plaintiff in error.

F. E. Riddle, for defendants in error.

KANE, J. There is a stipulation in the above-entitled cause to the effect that it may abide the result of *St. L. & S. F. R. Co. v. Ladd, ante,* 124 Pac. 461. In pursuance of said stipulation, the judgment of the court below is reversed and the cause remanded, with directions to grant a new trial.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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ST. LOUIS, I. M. & S. RY. CO. v. MARLIN.

No. 1062. Opinion Filed May 14, 1912.

Rehearing Denied September 24, 1912.

(128 Pac. 108.)

1. **RAILROADS—Operation—Injuries by Fire—Presumptions.** Proof that property has been destroyed by sparks emitted by a passing locomotive creates a presumption of negligence on the part of the railroad company or its employees, either in the construction or handling of the locomotive, or in failing to keep it in proper repair.

2. **SAME—Question for Jury.** Where it clearly appears that a fire was started on the right of way of a railroad by a passing locomotive, which extended to and destroyed adjoining property, and the company, on the trial of an action against it, produces testimony, which was not directly contradicted, tending to show that the locomotive was properly constructed, equipped, inspected, and operated, **held,** that it was the province of the jury to determine whether the presumption of negligence, created by the starting of the fire, was overcome, since the jury had the right to weigh the testimony, and to determine whether the witnesses for the company were credible. Following **McCullen v. Chicago & N. W. Ry. Co.,** 101 Fed. 66, 44 C. C. A. 365, 49 L. R. A. 642, and **Great Northern Ry. Co. v. Coats,** 115 Fed. 452, 53 C. C. A. 382.

3. **APPEAL AND ERROR—Review—Harmless Error.** Errors committed by a court on a trial, which cause no prejudice, will not require a reversal of the judgment rendered on appeal.

(Syllabus by the Court.)

Error from District Court, Wagoner County; John H. King, Judge.

Action by Annie Marlin against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lovick P. Miles and *Vincent M. Miles,* for plaintiff in error.

Robert F. Blair, for defendant in error.

DUNN, J. This case presents error from the district court of Wagoner county. Defendant in error, hereinafter called plaintiff, filed suit against the plaintiff in error on the 22d day of Oc-

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tober, 1907, alleging that she was the owner of certain lands, and that on July 29, 1907, the defendant was a railway corporation and at said time equipped, manned, owned, and operated an engine drawing a train of passenger cars over its line of road, and carelessly and negligently set out fire upon its right of way and to the hay growing upon plaintiff's land, burning up forty-two tons thereof and forty-six trees, to plaintiff's damage in the sum of $608. The defendant filed its answer, denying the same, and alleging negligence on the part of plaintiff.

The land lay, and the damage complained of occurred, in that portion of the state formerly known as the Indian Territory, and the action was originally filed in the United States Court for the Western District of the Indian Territory, sitting at Wagoner, and, after statehood, was transferred to the district court of Wagoner county. The issues were submitted to a jury, which, after hearing the instructions of the court, returned a verdict in plaintiff's favor, upon which judgment was entered, to reverse which the cause has been lodged in this court.

The court very properly instructed the jury that under the pleadings the issue presented was, "Did the defendant negligently equip, or negligently man, or negligently operate, the engine mentioned in the testimony?" and that "the burden is upon the plaintiff in this case to prove, by a preponderance of the evidence, the negligence of the defendant in one of these respects. If the plaintiff fails to prove such negligence by a preponderance of the testimony, your verdict must be for the defendant." The claim of counsel for defendant is that the evidence adduced fails to meet the measure demanded by these instructions, and that there is no evidence in the case of any negligence whatsoever on its part, but that the uncontradicted evidence supports the proposition that it was free from negligence.

At the time and place where this fire occurred, there was no statute in force making a railway company liable in all events for fires which it set out; but the rule obtained that evidence showing that the fire originated from sparks from a passing engine operated by the defendant constituted *prima facie* proof of negligence, shifting the duty to the railway company to show

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that it was free from blame. *St. Louis, I. M. & So. Ry. Co. v. Lawrence,* 4 Ind. T. 611, 76 S. W. 254. The plaintiff offered evidence to establish the ownership of the property destroyed, and that an engine drawing one of defendant's passenger trains passed near where the fire started at or about the time it was discovered. None saw the engine set the fire; but it was competent to offer these circumstances as evidence to support plaintiff's contention that the engine of the defendant set the fire, circumstantial evidence being admissible for this purpose (*St. Louis & S. F. R. Co. v. Shannon,* 25 Okla. 254, 108 S. W. 401, 21 Ann. Cas. 1209), and we think there can be no doubt that this theory is correct. There was no other hypothesis or fact offered upon which it was possible to predicate a doubt that the fire emanated from sparks from one of the defendant's engines. On showing this, the destruction of property, its ownership, and value, plaintiff rested. Thereupon the defendant offered a number of witnesses, for the purpose of identifying with certainty the particular engine and the engineer and fireman serving the same, which, it was shown, passed over the line of road at the time of the fire. Among the witnesses examined were the engineer, the fireman, two boilermakers, and a master mechanic. Without entering into any detail of the evidence of each of these witnesses, it will be sufficient to say that their testimony disclosed that they were all skilled workmen, highly experienced in their different lines of duty, ranging from a few years to 34 years in their different occupations. Each testified that the other was competent, qualified, and highly skilled in his particular line of work, and all testified that the engine was in good condition, and was handled in a careful, capable, competent manner. Each of the boilermakers, as well as the master mechanic, testified that the engine was equipped with a spark arrester, which was the best known in practical use, and that it was in good condition, and was, as one witness put it, "the best ever known." The engine was shown to have been examined before it entered upon its run, and again after its run, and was pronounced by these witnesses to have been in first-class condition. On this showing it is the contention of counsel for defendant

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that such a case was made out that it was the clear duty of the court to instruct a verdict in its favor, and counsel invoke the rule adopted by the courts in a number of states that, where it is shown that the engine was furnished at the time with the best and most practical screen and spark arrester, and was in perfect order, the company could not be held liable for damages produced by fires set out by escaping sparks, for the reason that the condition presented irrefutably rebutted any proof or conclusion of negligence properly deducible from the starting of the fire; that the duty of the company was to exercise reasonable care to provide the best and safest appliances in use to prevent the escape of fire; and that it was only liable for the negligent failure in this respect.

It is also contended that, where uncontradicted evidence is offered for the purpose of showing such a perfect condition of the defendant's engine as to prevent the escape of fire, a jury will not be permitted to find against such evidence on the presumption of negligence raised by the mere fact of the setting of the fire. While such a holding finds favor in the decisions of a number of appellate courts of the states, the Circuit Court of Appeals of the Eighth Circuit, which was the court of final resort for this case at the time and place where it arose, has, in at least two cases, held to the contrary. *McCullen v. Chicago & N. W. Ry. Co.,* 101 Fed. 66, 44 C. C. A. 365, 49 L. R. A. 642; *Great Northern Ry. Co. v. Coats,* 115 Fed. 452, 53 C. C. A. 382.

In the McCullen case it appeared that a flour mill was destroyed by fire, which, it was charged, was set by sparks negligently suffered to escape from one of defendant company's locomotives. On the trial of the case, the court withdrew it from the consideration of the jury, and instructed a verdict for the defendant. It was shown that there was virtually no source from which the fire could have started, except from one of the defendant's locomotives, and, in view of this, the court on appeal, speaking through Thayer, Circuit Judge, said:

"It is contended, however, by counsel for the railroad company that, even if it be true that there was substantial testimony

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which tended to show that the fire was occasioned by sparks which were emitted by the passing locomotives, and that, even if the jury had so found, yet the fact so established would not have created a presumption that the defendant company or its employees were in any respect negligent. On this ground it is urged that the case was properly withdrawn from the jury, inasmuch as the defendant offered considerable testimony which tended to show that its engines were properly handled, and were provided with spark arresters, which were in good state of repair on the day of the fire; whereas the plaintiff produced no direct evidence to the contrary. It is true that there are some cases which hold that the mere fact that sparks have escaped from a locomotive and set fire to adjoining property creates no presumption of negligence on the part of the railway company, either in constructing or handling its locomotive; but the weight of judicial opinion is the other way, and it is now comparatively well settled that a presumption of negligence does arise from the fact that sparks have issued from a passing locomotive of such size or in such volume as to kindle a fire and destroy adjacent property. [Citing authorities.] When the plaintiff offered evidence which was sufficient to raise a presumption of negligence, it was the province of the jury to decide whether the defendant's rebutting proof was adequate to overcome that presumption. As was said, in substance, by the Supreme Court of Minnesota, in *Karsen v. Railway Co., supra,* a jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the evidence and circumstances bearing upon the condition and mode of operating the engine, as well as the circumstances under which the fire took place. Moreover, if the jury were satisfied, and so found, that the mill was ignited by a spark which came from one of the defendant's locomotives, it may well be that this fact alone would have led them to discredit the statements of the defendant's witnesses concerning the condition of the locomotives and how they were handled; and the right of the jury to discredit them, for that reason, cannot be denied."

We have examined the other questions presented by counsel for defendant, but believe them also to be without merit. On the issue of the measure of damages, the amount prayed for by plaintiff was $608. The verdict of the jury was $224.20. Our statute (Comp. Laws 1909, sec. 2907) provides that the meas-

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ure of damages for tort is such as will compensate fully for the detriment proximately caused thereby. There is some difference in the holdings of the courts as to the proper manner of establishing such damages as were inflicted in this case; but plaintiff's witnesses testified to facts showing damages far in excess of the amount allowed by the jury. They testified to the value of the hay and trees destroyed, and also the difference in the value of the land before and after the fire, either of which showed damages larger in amount than the verdict. Under these circumstances, even though one of the methods followed was erroneous, defendant was not injured thereby, as the verdict returned was much less than the proof would sustain under either.

Counsel inveigh against the argument made by counsel for plaintiff, in which he argued to the jury that the defendant's witnesses had not stated the truth, and that they had been drilled. In order for us to reverse the judgment of the trial court on this ground, it would be necessary to show that this error affected the judgment of the jury. We cannot see that it did; and believing, as we do, that the rule laid down and obtaining in the jurisdiction where this case arose and was filed, entitled plaintiff to recover, the trial being free from error, the judgment of the trial court is affirmed.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

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NATIONAL EXCHANGE BANK v. HAHN.

No. 1078. Opinion Filed November 14, 1911.

Rehearing Denied September 10, 1912.

(126 Pac. 554.)

LANDLORD AND TENANT—Rent—Abandonment by Tenant. Where a tenant, a national bank, goes into voluntary liquidation under the national banking laws, and abandons leased premises before the expiration of the term of the lease, the landlord is not required to relet for the protection of the tenant, but may, at his election, suffer the premises to remain vacant and recover his rent for the remainder of the term by means of an action on the lease.

(Syllabus by the Court.)

Dunn, J., dissenting.

Error from District Court, Custer County; James A. Tolbert, Judge.

Action by Hulda Hahn against National Exchange Bank. Judgment for plaintiff, and defendant brings error. Affirmed.

George W. Cornell and *Porter H. Morgan,* for plaintiff in error.

George S. Pearl and *George T. Webster,* for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover rent due according to the terms of a certain written lease. On a trial before the court, there was judgment for the plaintiff for the full amount claimed, to reverse which this proceeding in error was commenced.

There is no dispute concerning the lease or its terms, and the case turns entirely upon the proper amount of recovery, as a question of law. It seems that the defendant, a national bank, entered into voluntary liquidation under the national banking laws before the expiration of the time mentioned in the lease.

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and, having no further use for the leased premises, which were used as a bank building, vacated the same, and refused to pay rent. Counsel for plaintiff in error in their brief say:

"We wish to impress upon the court that the question in this case is not a question of whether or not the bank could be sued, or whether or not the lease was made, or whether or not the rental is paid, for the bank could be sued, the lease was made, and the rent was not paid; but we contend that the question is one of the measure of damages recoverable for the breach of an executory contract, where the lessee has become totally incapacitated from performing its covenants."

This question seems to be answered by *Higgins v. Street*, 19 Okla. 45, 92 Pac. 155. The syllabus reads as follows:

"If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may, at his election, at once enter and terminate the contract, and recover the rent due up to the time of abandonment, or he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages."

In support of this doctrine the court cited with approval Jones on Landlord and Tenant, sec. 549, as follows:

"After an unauthorized abandonment by a tenant, the landlord may, by taking proper precautions, relet to another without creating a surrender by operation of law; but he is not bound to do so. In a recent case it was said: 'The rule sanctioned by the decided weight of authority, if, indeed, there can be said to be a diversity of opinion on the subject, is that the landlord may, in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damages will be the agreed rental, less the amount realized on account of such reletting, or he may permit the premises to remain vacant until the end of the term and recover his rent in accordance with the terms of the lease.' Although the landlord may relet for the benefit of the lessee and on his account without releasing him from his undertakings, such acts, if unexplained, would amount to a surrender by operation of law, as in a case where the lessor accepted the surrender."

The recent case referred to by the author is *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914. It seems to be in point here. In

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that case the defendant in error by a written indenture leased to the plaintiff in error certain real estate situated in the city of Blue Springs. The defendant went into possession under said lease and occupied the premises for the period of two months, at the expiration of which time he abandoned the same without Willis' consent. The action was on the lease for the balance of the rent reserved up to the expiration of the term as per the stipulated terms of the lease. The court held:

"A landlord is not, upon the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant, and recover his rent for the remainder of the term by means of an action on the lease."

In delivering the opinion of the court Mr. Chief Justice Post used the language quoted by Judge Jones, *supra*.

The judgment of the court below is affirmed.

TURNER, C. J., and HAYES, J., concur; WILLIAMS, J., absent, and not participating; DUNN, J., dissenting.

HASKELL *et al., Com'rs of Land Office*, v. HAYDON.

No. 2420. Opinion Filed April 9, 1912.

Rehearing Denied September 11, 1912.

(126 Pac. 232.)

1. **PUBLIC LANDS—Grants by United States—Acceptance by State.** Section 1, art. 11, of the Constitution, provides for the acceptance by the state of all grants of land and donations of money made by the United States under the provisions of the Enabling Act for the uses and purposes, and upon the conditions and under the limitations, for which the same are granted or donated.

2. **SAME—Sale of School Lands.** Section 9 of the Enabling Act (Act June 16, 1906, c. 3335, 34 St. at L. 274) provides that "sections 16 and 36, and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in 160-acre tracts or less, under such rules and regulations as the Legislature of the said state may prescribe; preference right to purchase at the highest bid being given to the lessee. * * *"

3. **SAME—Constitutional Provisions.** Section 4, art. 11, of the Constitution, confers upon the Legislature exclusive power to pre-

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scribe, "in conformity with the regulations of the Enabling Act," rules and regulations for the sale of all public lands set apart to the state by Congress, and all lands taken in lieu thereof, for charitable, penal, educational, and public building purposes.

4. **SAME—Authority of Commissioners of Land Office.** Section 32, art. 6, of the Constitution, provides that the commissioners of the land office "shall have charge of the sale, rental, disposal and managing of the school land and other public lands of the state."

5. **SAME—Size of Tracts.** There is no rule or regulation prescribed by the Legislature which requires the commissioners of the land office to offer for sale indemnity lands in excess of 160 acres, to wit, 640 acres, embraced in the lease of a school land lessee, and allow him a preference right to purchase the entire tract at the highest bid.

(Syllabus by the Court.)

Error from Superior Court, Logan County; J. M. Sandlin, Judge.

Action by W. L. Haydon against C. N. Haskell and others as Commissioners of the Land Office of the State of Oklahoma. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

Charles West, Atty. Gen., and *Charles L. Moore*, Asst. Atty. Gen., for plaintiffs in error.

Burford & Burford, J. Elmer Thomas, and *Ed O. Cassidy*, for defendant in error.

KANE, J. This was what is designated by counsel for defendant in error in their brief "a friendly suit," commenced for the purpose of settling certain rights which the defendant in error, who was plaintiff below, alleged he was entitled to as a school land lessee. The court below decided in favor of the plaintiff, defendant in error here; whereupon the Attorney General filed this proceeding in error to review the action of the trial court.

It seems that the defendant in error holds a valid lease on 640 acres of indemnity lands lying west of range 14, west of the Indian meridian. The record, as it stands in this court, presents for review the following question only: Under the rules

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and regulations prescribed by the Legislature governing the sale of indemnity lands, will mandamus lie, directing the commissioners of the land office to offer for sale the land covered by his lease, and allow him to exercise a preference right to purchase at the highest bid each 160-acre subdivision thereof?

This question must be answered in the negative. Section 9 of the Enabling Act provides that "said sections sixteen and thirty-six, and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in one hundred and sixty-acre tracts or less, under such rules and regulations as the Legislature of the said state may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. * * *" Act Cong. June 16, 1906, c. 3335, 34 St. at L. 274. Section 10 of the Enabling Act makes like provision in relation to sections 13 and 33. Section 1, art. 11, of the Constitution, provides for the acceptance by the state of all grants of land and donations of money made by the United States, under the provisions of the Enabling Act, for the uses and purposes, and upon the conditions and under the limitations, for which the same are granted or donated.

It will be noticed that each of the foregoing sections of the Enabling Act, in addition to granting a preference right to purchase at the highest bid to the lessee at the time of such sale, grants to the Legislature exclusive power to decide whether the land shall be sold, and, if sold, to prescribe rules and regulations in relation thereto. In pursuance of this power, the Legislature enacted article 6, c. 94, Comp. Laws 1909, entitled "An act providing for the sale of all public lands owned by the state of Oklahoma taken in lieu of lands embraced in sections numbered 13, 16, 33, and 36, according to the United States survey," etc. Section 7476 of that article provides for the sale of the lands known as "indemnity lands," subject to such "limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or any act amendatory

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hereof. * * *" And paragraph b of section 7478 provides that:

"Any lessee holding a lease on any of the lands described in section 1 (7476) of this act, except New College lands, shall have the preference right to purchase one hundred and sixty (160) acres so leased at the highest bid at the time of the sale of the same as hereinafter provided in this bill: Provided, further, that none of the lands enumerated in section 1 of this act (7476) except the lands that bear no preference right which were secured under and by virtue of section 12 of the Enabling Act, which is under lease to any person or persons holding a lease on more than one hundred and sixty acres, on which he may claim a preference right of purchase, shall be sold until such lessee shall file a written waiver of his preference right to purchase any of such land so leased, except one hundred and sixty acres, with the commissioners of the land office, and the said commissioners shall reserve the same from sale until such waiver is so filed, and the purchaser shall accept said land with condition of such waiver. * * *"

The foregoing rules and regulations are the only ones adopted by the Legislature governing the lands herein, and, of course, the lands must be sold in accordance with them, or not at all. If the prayer of the petition is granted, it will require the commissioners of the land office to proceed contrary to the directions of the Legislature, with whom lies the sole authority to prescribe rules and regulations. If we understand paragraph b, *supra*, correctly, the lands embraced within the lease of the defendant in error cannot be sold until such lessee "shall file a written waiver of his preference right to purchase any of such land so leased, except one hundred and sixty acres, with the commissioners of the land office," and said commissioners are required to "reserve the same from sale until such waiver is so filed, and the purchaser shall accept said land with condition of such waiver." There is no allegation that the commissioners of the land office are about to proceed in violation of the foregoing statutory direction, or that they are offering or threatening to sell the lands embraced within the defendant in error's lease, or any part thereof, or to disturb him in the peaceable possession thereof. The lessee may refuse to file the written waiver of his

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preference right, whereupon the lands embraced within his lease must be reserved from sale until such waiver is filed; but he cannot compel the commissioners of the land office to offer the entire tract for sale, or to give him a preference right to purchase at the highest bid a tract in excess of 160 acres, until the Legislature confers that power upon them, and it certainly has not done so up to this time.

The judgment of the court below must be reversed and the cause remanded, with directions to take such further proceedings as may be necessary, not inconsistent with this opinion.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

STATE *ex rel.* BALLARD, *Ins. Com'r,* v. HOOKER, *Co. Atty., et al.*

No. 3007. Opinion Filed May 14, 1912.

Rehearing Denied September 10, 1912.

(126 Pac. 231.)

QUO WARRANTO—Parties—Commissioner of Insurance—Forfeiture of Charter. The Commissioner of Insurance, by virtue of article 6, secs. 1, 22, and 23, of the Constitution, is authorized to bring suit in quo warranto in the district court to forfeit the charter of a corporation and oust it from doing business in the state, without the intervention of the county attorney.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by the State, on the relation of P. A. Ballard, Insurance Commissioner, and Sam Hooker, County Attorney of Oklahoma County, against the Union Mutual Insurance Company of Enid. From a judgment dismissing the action on the motion of the County Attorney of Oklahoma County, relator Ballard brings error. Reversed and remanded, with directions.

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Ledbetter, Stuart & Bell, for plaintiff in error.

Sam Hooker, Wm. Zwick, W. J. Otjen, Warren K. Snyder, and *Chalmers B. Wilson,* for defendants in error.

TURNER, C. J. On April 11, 1911, there was brought, in the district court of Oklahoma county, an action in *quo warranto* styled, "The State of Oklahoma *ex rel.* P. A. Ballard, Insurance Commissioner of the State of Oklahoma, and *ex rel.* Sam Hooker, County Attorney of Oklahoma County, State of Oklahoma, Plaintiff, v. Union Mutual Insurance Company (of Enid), a Corporation, Defendant," the object of which was to forfeit the charter of defendant and oust it from doing business in the state. Among other things, the petition states:

"That this action is instituted by authority of and at the direction of the said Perry A. Ballard, the Insurance Commissioner of the state of Oklahoma, acting under the authority of law conferred upon him as such Insurance Commissioner and for the purpose of enforcing and executing the laws of this state in relation to insurance and insurance companies doing business in the state of Oklahoma."

It was signed by said commissioner and said county attorney. On April 25, 1911, said Hooker, as county attorney aforesaid, moved the court to dismiss the action, whereupon said Ballard, as Insurance Commissioner aforesaid, filed his "protest" against such proposed action on the ground that the county attorney, having brought the suit at his direction, was not authorized to dismiss the same without the consent of said commissioner, and also on the ground that, as the action was brought to enforce the insurance laws of the state, the Insurance Commissioner had control over any litigation involving the enforcement of said laws. Later the court sustained said motion, on the sole ground that the county attorney had control of the action, and said commissioner, to reverse the judgment dismissing the action, brings the case here.

The court erred. The county attorney, not being a necessary party to the action, had no control over the same. The Insurance Commissioner was the proper party to bring the suit

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without the intervention of the county attorney. Article 6, sec. 1, of the Constitution reads:

"The executive authority of the state shall be vested in a Governor, * * * Commissioner of Insurance and other officers provided by law and this Constitution, each of whom shall * * * perform such duties as may be designated in this Constitution or prescribed by law."

Section 22:

"There is hereby established an insurance department, which shall be charged with the execution of all laws now in force, or which shall hereafter be passed, in relation to insurance and insurance companies doing business in the state."

Section 23:

"There shall be elected by the qualified electors of the state, at the first general election, a chief officer of said department, who shall be styled the 'Insurance Commissioner.' * * *"

In *Homesteaders v. McComb,* 24 Okla. 201, 103 Pac. 691, 20 Ann. Cas. 181, we said, in effect, that the Insurance Commissioner, being an executive officer of the state, was charged with the duty of executing the laws in force in the state relating to insurance and insurance companies doing business therein.

Now, as in *State ex rel. Taylor v. Cockrell,* 27 Okla. 630, 112 Pac. 1000, we in effect held that the State Examiner and Inspector, being vested by the Constitution with executive power and charged by law with certain duties which he could exercise independent of the Governor, could bring an original action in mandamus in this court on his own relation against the Bank Commissioner to compel him to permit the inspector to examine certain records, books and papers belonging to a failed bank, in the hands of said commissioner, so we hold here that the Insurance Commissioner, being likewise vested by the Constitution with executive powers and charged with the duty of executing the laws in force in the state relating to insurance and insurance companies, had the right to bring this suit in the district court on his own relation without the intervention of the county attorney; that, having the right so to do, it was unnecessary to make him a party; that, being an unnecessary party, the county attorney, on his own motion, or on motion of the

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commissioner, could have been stricken as a party from the record, or the county attorney could at any time have withdrawn from, but could not be permitted to dismiss, the case. The court, therefore, erred in permitting him so to do.

The cause is reversed and remanded, with directions to reinstate the cause, and, when reinstated, to permit the county attorney to withdraw therefrom, if he so desires, and that the same proceed in accordance with this opinion.

All the Justices concur.

CLARK v. DRAKE.

No. 3351. Opinion Filed May 14, 1912.

Rehearing Denied September 10, 1912.

(126 Pac. 232.)

APPEAL AND ERROR—Dismissal—Failure to Serve Summons. A petition in error, with case-made attached, filed in this court within the year allowed under the statute, will be dismissed on motion, where there is neither waiver of service, nor issuance of summons in error, nor praecipe for summons in error filed, nor general appearance made within such time.

(Syllabus by the Court.)

Error from Superior Court, Custer County;
J. W. Lawter, Judge.

Action between H. H. Clark and D. A. Drake. From the judgment, Clark brings error. Writ of error dismissed.

Geo. T. Webster, for plaintiff in error.

Jones & Linville, for defendant in error.

WILLIAMS, J. On March 16, 1911, judgment was rendered in favor of the defendant in error. On the same day motion for new trial was filed, and on May 1, 1911, said motion was overruled. Motion is now made by the defendant in error to dismiss the proceeding in error in this court, on the ground that the same was not commenced within one year from the date

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of the overruling of said motion for a new trial. Neither has any summons in error been issued, nor any praecipe for summons in error been filed with the clerk of this court, nor has any waiver of the issuance of such summons in error been made, nor any appearance entered on the part of the defendant in error.

The motion is sustained. *Coleman v. Eaton,* 26 Okla. 858, 110 Pac. 672; *Hartsell v. Edwards,* 29 Okla. 119, 116 Pac. 942; *Simmons v. Lauffer,* 29 Okla. 132, 116 Pac. 943.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

SULLINS *et al., Board of County Com'rs, v.* STATE *ex rel.* BARNARD, *Com'r of Charities and Corrections.*

No. 3484. Opinion Filed June 20, 1912.

Rehearing Denied September 24, 1912.

(126 Pac. 732.)

1. **MANDAMUS—Parties—Commissioner of Charities and Corrections.** The right of the Commissioner of Charities and Corrections to bring suit on her own relation, in the name of the state, to mandamus the board of county commissioners to pass upon the qualifications of a probation officer appointed by the county court, and to certify the same back to the county court, if not expressly authorized by constitutional or statutory authority, is fairly inferred, being commensurate with her trust.

2. **SAME—Subjects of Relief—Acts of Officers.** A board of county commissioners, to whom was referred an appointment by the county court of a person as probation officer, refused to determine whether the proposed appointee was a discreet person of good character and qualified, under an act approved March 24, 1909 (article 8, c. 14, p. 188, Sess. Laws 1909), for the office, but determined that it was inexpedient to confirm said appointment. **Held,** that said board of county commissioners may be ordered by mandamus to pass upon the qualifications of said officer and certify the same to the county court.

3. **MANDAMUS—Proceedings—Quashing Writ.** A motion to quash a peremptory writ of mandamus, issued without notice, will be sustained, where the writ was improperly or improvidently granted.

(Syllabus by the Court.)

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Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Mandamus by the State, on the relation of Kate Barnard, as Commissioner of Charities and Corrections, against J. W. Sullins and others, as the Board of County Commissioners of Okmulgee County. Judgment for plaintiff, and defendants bring error. Affirmed.

J. W. Childers, Co. Atty., for plaintiff in error.

Dr. J. H. Stolper, General Attorney for the Commissioner of Charities and Corrections and Public Defender of the State of Oklahoma, for defendant in error.

TURNER, C. J. On December 13, 1911, the state of Oklahoma *ex rel.* Kate Barnard, as Commissioner of Charities and Corrections, filed in the district court of Okmulgee county a verified motion in the shape of a petition, wherein J. W. Sullins, Charley Myers, and Thomas Chism, as the board of county commissioners of Okmulgee county, plaintiffs in error, are made parties defendant. The allegations of the petition are made by her attorney, Dr. J. H. Stolper, who, after alleging himself so to be, and that Kate Barnard is the duly elected, qualified, and acting Commissioner of Charities and Corrections for the state of Oklahoma, substantially states that as such Commissioner she has certain duties to perform within the state imposed by law in relation to the dependent, neglected, and delinquent children of each and every county in the state, and the juvenile courts thereof; that by Senate Bill 88, Sess. Laws 1909, the county judges of each county of the state are required to appoint a probation officer, charged with the duty of supervising such children in his county before and after trial, in the event said children are placed on probation in the manner provided by law; that petitioner cannot discharge the duties imposed upon her by law as an executive officer of the state, unless such officer is duly appointed by the court, and that such children are entitled to the benefits, privileges, and protection of such officer in that county; that, pursuant to her duties so imposed, she had thereto-

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fore appeared before the judge of the county court and juvenile court in and for said county; that, pursuant thereto, on December 7, 1911, said judge appointed one W. H. Lucas, a discreet person of good moral character, as probation officer for said county; that said appointment was duly certified to the board of county commissioners of said county, and that said board has failed and neglected, and still fails and neglects, to pass upon the qualifications of said Lucas, on the sole ground that it is inexpedient to confirm said appointment; and that, as petitioner is without adequate remedy at law, she prays for a writ of peremptory mandamus, which, without notice, thereupon issued, commanding the said Sullins, Myers, and Chism to meet as a board at the county seat on December 19, 1911, and pass upon the qualifications of said Lucas as probation officer for said county, and to certify to the court within three days the fact of his qualification or disqualification. On December 18, 1911, came the county attorney, specially appearing for the board, and moved the court to quash the writ on certain grounds therein stated, and to dismiss the petition, and, upon the same being overruled, said Sullins, Myers, and Chism, through the county attorney, duly excepted and bring the case here.

If for any reason this writ was improperly or improvidently issued, it should have been quashed. 13 Enc. Pl. & Pr. p. 790; *State v. Madley*, 17 Neb. 564, 24 N. W. 200; *State v. Elkinton et al.*, 30 N. J. Law, 335. There is no merit in the contention that the writ should have been quashed on the ground that relator had no power to bring this suit.

Article 6, sec. 1, of the Constitution, reads:

"The executive authority of the state shall be vested in the Governor * * * Commissioner of Charities and Corrections * * * and other officers provided by law and this Constitution, each of whom shall * * * perform such duties as may be designated in this Constitution or prescribed by law."

Article 6, sec. 27:

"A Commisisoner of Charities and Corrections shall be elected in the same manner, at the same time, and for the same term as shall the Governor. Said officer may be of either sex, and shall be twenty-five years of age or over; in all other respects said

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officer shall have the qualifications which shall be required of the Governor."

Section 28:

"The Commissioner of Charities and Corrections shall have the power, and it is hereby made his or her duty, to investigate the entire system of public charities and corrections, to examine into the condition and management of all prisons, jails, almshouses, reformatories, reform and industrial schools, hospitals, infirmaries, dispensaries, orphanages, and all public and private retreats and asylums, which derive their support wholly or in part from the state, or from any county or municipality within the state; and the officers of the various institutions named herein shall promptly, upon demand, furnish the said Commissioner with such information, relating to their respective institutions, as shall be demanded by said Commissioner, in writing. The said Commissioner shall have the power to summons any person to appear and produce such books and papers as shall be designated in the summons, and to give testimony under oath concerning the matter and institution under investigation. The said Commissioner shall have the power to administer oaths to such persons as may be summoned, and to enforce all such powers as are given to notaries public when they are taking depositions. A full report of said investigation, including the testimony, shall be promptly made to the Governor, and shall be transmitted by him to the next Legislature with any suggestions which he may desire to make."

Section 29:

"On the first day of October of each year, and at any time on request of the Governor, the said Commissioner shall make a full and complete report of the operations and administration of said office, with such suggestions as said Commissioner may deem suitable and pertinent."

Section 30:

"The Legislature shall have power to alter, amend, or add to the duties of, or grant additional authority to, such Commissioner."

Defining her duties under these sections is an act, approved March 23, 1908 (Laws 1908, c. 23, art. 1), section 2 of which makes it her duty to visit, inspect, and inquire into the condition and management of all state penal, relief, and correctional institutions, and all eleemosynary institutions, of whatever name or character, at least once a year. Section 3 extends this duty

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to the county jails, almshouses, poor farms, pesthouses, and other county penal, correctional, and charitable institutions, and requires that she make recommendations concerning such to the board of county commissioners. Section 4 extends this duty to all city jails, holdovers, hospitals, dispensaries, and all other city penal, correctional, and charitable institutions, and requires her to make recommendations concerning the same to the mayor or the city council. Section 5 makes it her duty, at the request of the Governor, to investigate any state penal, correctional, or eleemosynary institutions against which complaint has been made, vesting her with power to summon witnesses and take testimony under oath; and section 6 makes it her duty to report any such investigation to the Governor. Section 7 extends her power of visitation to all maternity hospitals, retreats, lying-in hospitals, rescue homes, and foundling institutions in the state, and makes it her duty, after inspection and examination, to issue certificates authorizing them to operate for one year from the date thereof, with power to revoke the same upon notice; also makes it her duty to prosecute any violation of law in connection with those institutions. Section 8 makes it her duty to investigate all complaints made upon affidavit, against such institution, and also against all baby farms and orphanages, of whatever name or character, conducted by individuals for private gain, or which either charge for their services, or subsist, in whole or in part, on money collected as charity. This section also gives her power to order such places closed, and to restrain their opening. Section 9 extends her power to the inspection and examination of the methods and records of all orphanages, children's aid, home-finding societies and all other similar organizations, whether incorporated or not, formed for the purpose of adopting into families such foundlings, orphans, and dependent children as come into their hands. Section 10 makes it her duty, on sworn complaint of one or more responsible citizens against any county, city, or private institution, corporation, or other organization named in the act, to investigate, and, upon finding conditions as complained of, she is authorized to order an abatement thereof, and to prosecute the officers of such institution for failure to obey the order.

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Section 11 gives her power, in making such investigation, to summon witnesses and compel the production of books and papers, and testimony under oath, and the right to exercise all powers given a notary public when taking depositions. Section 12 makes it her duty to appear as next friend for all minor orphans, dependents, and delinquents, who are inmates of any public institutions maintained and operated by the state, county, city, or municipality, before any court having probate jurisdiction, and ask that a guardian be appointed, when it appears that such children have an interest in property. Section 13 makes it her duty to report annually to the Governor and make duplicate reports to the Legislature.

What is known as the juvenile court bill, approved March 24, 1909 (Sess. Laws 1909, c. 14, art. 8), in section 1, defines a "dependent child" and a "neglected child," also a "delinquent child," and provides that any child committing any of the offenses mentioned in the act shall be deemed a delinquent child, and proceeded with as therein provided. Section 2 provides that the several counties in the state shall have jurisdiction in all cases coming within the provisions of the act, and that in trials thereunder the child informed against, or any one interested in such child, shall have a right to demand a jury, etc. It also provides in all counties for a special record book or books to be kept by the court for all cases coming within the provisions of the act, and that at a certain time in each year the clerk or judge of the juvenile court shall submit to the Commissioner of Charities and Corrections a record in writing, upon blanks to be furnished by her, showing the number and disposition of delinquent children brought before such court, together with such other useful information regarding such cases, etc., as may reasonably be obtained at the trial. Section 5 reads:

"The court shall have authority to appoint, or designate, by and with the consent of the county commissioners, one discreet person of good character to serve as probation officer during the pleasure of the court; said probation officer to receive compensation of fifty dollars per month from county funds, to be paid by county commissioners. In case the probation officer shall be appointed by any court, it shall be the duty of the clerk

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of the court, if practicable, to notify the said probation officer in advance when any child is to be brought before the court; it shall be the duty of said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require; and to take such charge of any child before and after trial as may be directed by the court."

Section 6 provides that when a child under the age of sixteen years shall be found to be dependent or neglected, within the meaning of the act, the court may make an order committing such child to the care of a suitable state institution, or to some responsible citizen, or to some training or industrial school, as provided by law.

It is unnecessary to further review the act, except to say that section 10 reads that the same "shall be liberally construed, to the end that its purpose may be carried out, to wit: That the care and custody and discipline of the child shall approximate, as nearly as may be, that which should be given by its parents. * * *"

Section 2 of an act, approved February 24, 1911 (Laws 1911, c. 25), amending section 12 of the act of March 23, 1908, reads:

"The Commissioner of Charities and Corrections shall have the power, and it shall be his or her duty to appear as 'next friend' for all minor orphans, defectives, dependents and delinquents, who are inmates of any public institution maintained and operated by the state, county, city or municipality, before the county court having probate jurisdiction, and ask that legal guardians be appointed for the estate of such minor orphans, defectives, dependents and delinquents, when it appears that such persons have an interest in some estate, legacy, or property, and shall have such power and authority in any and all litigation where interests of such persons may require to be prosecuted or defended or instituted in any and all courts in this state."

Comment on specific portions of these constitutional and statutory provisions is unnecessary, except to say that the same are a near approach to direct statutory authority to bring this suit. From their scope, it is apparent that their whole intent is to place her, as near as possible, *in loco parentis* to the unfortunate

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class with which this opinion deals, and charges her in broad terms to look after their welfare as required by law; and that the duty of securing the appointment of a probation officer, whose duties are in effect to assist her in a manner so to do, is fairly commensurate with her trust.

In *Auditor General v. Railroad Co.*, 82 Mich. 426, 46 N. W. 730, the court said:

"Aside from these statutory provisions, it is the general rule that public officers need not be expressly authorized by statute to bring suit, but that their capacity to sue is commensurate with their public trusts and duties. *Supervisor v. Stimson,* 4 Hill [N. Y.] 136; *Overseers v. Overseers,* 18 Johns. [N. Y.] 407; *Todd v. Birdsall,* 1 Cow. [N. Y.] 260 [13 Am. Dec. 522]; *County Treasurer v. Bunbury*, 45 Mich. 84, 7 N. W. 705."

See *Rouse v. Moore,* 18 Johns. (N. Y.) 407; *Pennoyer v. Wills,* 26 Ore. 1, 36 Pac. 568, 46 Am. St. Rep. 594; 29 Cyc. 1447.

In *Moore v. Nation,* 80 Kan. 672, 103 Pac. 1107, 23 L. R. A. (N. S.) 1115, 18 Ann. Cas. 397, the court said:

"The duties of an office include all of those that fairly lie within its scope; not merely those which are necessarily involved in the accomplishment of the main purpose of the office, but those, also, which, although incidental and collateral, naturally and properly serve to promote and benefit the performance of the principal duties. Constitutions and statutes seldom define with precision the scope of any office."

As in *Homesteaders v. McComb,* 24 Okla. 201, 103 Pac. 691, 20 Ann. Cas. 181, we said, in effect, that the Insurance Commissioner was an executive officer of the state, charged with the duty of executing the laws in force in the state relating to insurance and insurance companies doing business therein, and in *State ex rel. Taylor v. Cockrell,* 27 Okla. 630, 112 Pac. 1000, that the State Examiner and Inspector, being vested by the Constitution with executive power and charged by law with certain duties, could bring an original action in mandamus in this court, upon his own relation, against the Bank Commissioner to compel him to permit the Inspector to examine certain records belonging to an insolvent bank in the hands of said Commissioner, so we will hold here that the Commissioner of Charities and Corrections, being an executive officer of the state, is charged with

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the duty of executing all laws in aid of the enforcement of her trust, and had a right to bring this suit.

As in *Board of Commissioners, etc., v. State ex rel. Cobb, County Judge,* 31 Okla. 196, 120 Pac. 913, it is here conceded "there is no controversy between the parties that, in order to effect an appointment by the court of any person as probation officer, such appointment must have the consent of the county commissioners, and that they are authorized to determine whether such proposed appointee is a discreet person of good character and qualified, under the provisions of the act, for the office, and that in determining this fact the commissioners are vested with a discretion and judgment that cannot be controlled by mandamus," and that "the point of controversy between them is whether the county commissioners have authority, in determining whether they shall consent to any appointment made by the county court, to determine the necessity for such an appointment, and to refuse to consent to the appointment upon the ground that there is no need for such officer," the law as there announced governs this cause. And, as there is no merit in the contention that the petition fails to state facts sufficient to invoke the writ, or that the same is not properly verified, the judgment of the trial court is affirmed.

All the Justices concur.

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COLUMBIA BANK & TRUST CO. v. UNITED STATES FIDELITY & GUARANTY CO.

No. 1372. Opinion Filed April 9, 1912.

Rehearing Denied September 10, 1912.

(126 Pac. 556.)

1. **PRINCIPAL AND SURETY—Remedies of Surety—Action Against Principal.** A surety may maintain an action against his principal, to compel him to discharge the debt or liability for which the surety is bound, after the same has become due.

2. **SAME—Construction of Contract—Strict or Liberal Construction.** Section 1569, Comp. Laws 1909, which provides that the rule of the common law requiring a strict construction of the obligations of a surety shall have no application to the obligations of a surety or guarantor or indemnitor for hire, but all such obligations shall be liberally construed, in accordance with the rules of the general law applicable to policies of insurance, prescribes a rule of construction to guide the courts of this state, but does not otherwise affect the rights of a surety, where there is no ambiguity in the contract of suretyship.

3. **BANKS AND BANKING — Deposits — Guaranty Fund.** Section 7943, Comp. Laws 1909, which provides that, until the permanent school funds may be safely and advantageously invested in the securities prescribed by law, the commissioners of the land office are authorized to deposit said funds in such banks or trust companies as they may select, but shall in every case take as security for such deposits the following classes of securities and no others: Bonds of the state of Oklahoma, bonds of the counties, school districts, cities, and towns of this state, state and county warrants, and approved state, county, and municipal bonds of other states, bonds of the United States, first mortgages on real estate, warrants or other legal evidence of indebtedness authorized by law to be issued by municipalities in payment of paving, sewer, waterworks, electric lights, or other public indebtedness, and for which a special tax is authorized to be levied and collected for the payment thereof, and surety company bonds, and as additional security on any deposit which said board may make the said commissioners of the land office shall have authority to accept surety companies or trust companies as sureties, but in each case said board of land commissioners shall accurately investigate the value of securities offered for such deposits, provided, however, such surety company or trust company shall neither be in any manner interested directly or indirectly in any bank or trust company for which it becomes additional surety; nor shall any surety, bonding, or trust company be accepted as additional surety that has more than one-fourth of its paid capital invested in bank stock—pro-

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vides a specific system for the protection of any part of the permanent school fund temporarily deposited in such banks or trust companies, and the protection extended to general depositors by virtue of the police power of the state, by section 323, Comp. Laws 1909, which provides for the depositors' guaranty fund, does not apply to deposits of the permanent school fund.

(Syllabus by the Court.)

Russell, Special Judge, dissenting in part.

Error from District Court, Oklahoma County; George W. Clark, Judge.

Proceedings by E. B. Cockrell, Bank Commissioner, to wind up the affairs of the Columbia Bank & Trust Company. On application of the Bank Commissioner for an order of sale, the United States Fidelity & Guaranty Company files a petition in intervention. From a judgment for intervener, the Bank Commissioner brings error. Reversed and remanded, with directions.

Ledbetter, Stuart & Bell, for plaintiff in error.

Flynn, Ames & Chambers, for petitioner, the United States Fidelity & Guaranty Company.

KANE, J. The questions presented for decision arise out of the winding up of the affairs of the Columbia Bank & Trust Company by the Bank Commissioner of the state. Hereafter the Columbia Bank & Trust Company will be referred to as the bank, and the United States Fidelity & Guaranty Company as the surety company. On the 29th day of September, 1909, the Bank Commissioner took possession of the bank and its assets under and by virtue of the authority conferred upon him by the laws of the state in relation to insolvent banks and trust companies, for the purpose of paying the depositors and other creditors of the bank. Thereafter the Bank Commissioner made application to the district court of Oklahoma county for an order authorizing him to sell certain promissory notes, bonds, and other securities of the bank. The application of the Bank Commissioner alleged, in substance, that he had taken possession of the bank, and that it was necessary to convert certain securities in order to pay off the depositors. The prayer consisted of a re-

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quest for an order of sale, "and that the court make such other orders, in connection with the administration of the affairs of said bank, as may from time to time be necessary and proper, and that the said A. M. Young, as such Bank Commissioner, together with any and all creditors and depositors of said bank, be given and awarded by the court and the judge thereof all relief to which they may be entitled."

Thereafter the surety company filed its petition in intervention, wherein it alleged, in substance, that on the 18th day of May, 1909, it signed, as surety for said bank, a bond to the state of Oklahoma, for the sum of $50,000, to protect the state of Oklahoma against loss by reason of a deposit made in said bank of the funds coming into the possession of the commissioners of the land office of said state by virtue of their duties under the law; that ever since the Bank Commissioner had taken charge of the assets of said bank he had acted under the direction and control of the state banking board, composed of the Governor, State Auditor, President of the Board of Agriculture, Secretary of State, and Superintendent of Public Instruction, so that the Governor, State Auditor, and President of the Board of Agriculture comprised a majority and quorum of both the state banking board and commissioners of the land office; that immediately after said Bank Commissioner had taken charge of said bank the secretary of the school land board, acting under the direction and control of the Governor, State Auditor and President of the Board of Agriculture, made what they claimed was a demand for the money secured by said bond upon said Bank Commissioner, and said Bank Commissioner, acting under the authority and control of the Governor, State Auditor and President of the Board of Agriculture, comprising a majority of the banking board, refused the demand made by the secretary of the school land board; that thereupon said majority of the commissioners of the land office demanded of said surety company the sum of $50,000, the penalty of said bond executed by said surety, said commissioners claiming that they had on deposit with said bank at the time of its failure a large sum of money, in excess of the penalty of said bond; that the Bank Commissioner, under

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the direction of said majority of the board of land commissioners, comprising also a majority of the state banking board, had been paying the claims of other depositors in full without in any way protecting the said deposit made by the board of land commissioners; that, in the administration of the affairs of said bank, said Bank Commissioner had used in whole or in part, in paying off other depositors and creditors of said bank, approximately a half million dollars obtained from the depositors' guaranty fund; that it was the purpose and intent of said Bank Commissioner to pay off other creditors in full, to the exclusion of the deposit of the state of Oklahoma and the commissioners of the land office, secured by said bond of said surety company, and that the effect of said payments would be to unjustly and wrongfully prefer creditors who were being paid to the exclusion of the commissioners of the land office of the state of Oklahoma and to the detriment of the said surety company; that said surety company, at the time said Bank Commissioner took possession of said bank and its assets, was liable on said bond, and still remained liable thereon to the full amount, unless discharged by the wrongful and improper conduct of said Bank Commissioner and said banking board; that it was the purpose of said Bank Commissioner not only to pay off all other depositors of said bank to the exclusion of the state and the commissioners of the land office, but it was also the purpose of said Bank Commissioner to repay to said state banking board the depositors' guaranty fund which had been advanced by it in preference to the deposit secured by said bond of said surety company. The surety company prayed that said Bank Commissioner be enjoined from paying out any of the assets remaining in his hands to other creditors of said bank in preference to the state of Oklahoma and the commissioners of the land office, on account of the deposit secured by said bond of said surety company, and that said Bank Commissioner be restrained and enjoined from repaying to the banking board of the state of Oklahoma the guaranty fund advanced to him, or any part thereof, prior to the paying in full of the deposit secured by said bond of said surety company.

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The cause was submitted to the court below upon the pleadings, whereupon a decree was rendered restraining the Bank Commissioner from repaying to the banking board of the state of Oklahoma, or any other person or persons or officers, any part of the depositors' guaranty fund of the state of Oklahoma, which had been used, or was on hand, or available for use at the time that the commissioners of the land office made demand upon said surety company for $50,000, and said Bank Commissioner was ordered and directed to treat the amount due the commissioners of the land office as a deposit in said bank, and pay over to said depositors their pro rata share of the assets of said bank, and to further pay to said depositors the deficit, if any there might be, after said distribution out of the guaranty fund which had been used, or which was on hand or available for use, on the respective dates on which demand was made by said depositors upon said surety company. Exceptions to the rulings of the court were reserved by the Bank Commissioner and said surety company, and the case is now here for review upon their petition in error and cross-petition in error.

The questions presented by the petition in error of the Bank Commissioner and the cross-petition of the surety company are: (1) Did the surety company have a right to maintain its petition of intervention without having previously paid the penalty of its bond? (2) Is the deposit of the commissioners of the land office entitled to participate pro rata in the distribution of the assets of the bank? (3) After exhausting the assets of the bank, shall the deficit be paid by the guaranty fund, or by the surety company, or shall this deficit be prorated between the surety company and the guaranty fund?

The first question must be answered in the affirmative. By the terms of the bond the bank is called the principal, the surety company the surety, and the state of Oklahoma the obligee. This must be the legal relation of these parties in determining their rights and liabilities. Section 3606, Comp. Laws 1909, provides that "a surety may compel his principal to perform the obligations when due," and section 6055 provides that "a surety may maintain an action against his principal, to compel him to dis-

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charge the debt or liability for which the surety is bound, after the same has become due." It is a well-settled principle that a surety may resort to equity to compel the principal to pay the debt from his assets, if he has any, or to have his assets applied to the debt before paying any part of it. *Walton et al. v. Williams et al.*, 5 Okla. 642, 49 Pac. 1022; Pomeroy's Eq. Jur. sec. 1417; Stearns on Suretyship, p. 544; Frost on Guaranty Insurance, sec. 304; 32 Cyc. p. 248; *Barbour v. National Exchange Bank*, 45 Ohio St. 133, 12 N. E. 5. Under our system of procedure, the distinctions between actions at law and suits in equity are abolished, leaving but one form of action, called a "civil action." It has been held, however, that "while the Legislature has abolished the distinction between actions at law and suits in equity, yet the Legislature has not intended thereby to change the nature of the remedies which generally obtain in those jurisdictions where courts of law and chancery are separated." *Olson v. Thompson*, 6 Okla. 74, 48 Pac. 184, affirmed on rehearing 6 Okla. 576, 52 Pac. 388; *Aylesbury Mercantile Co. v. Fitch*, 22 Okla. 475, 99 Pac. 1089, 23 L. R. A. (N. S.) 573. The prayer of the Bank Commissioner to the pleading instituting this proceeding is that "any and all of the creditors and depositors of said bank be given and awarded by the court and the judge thereof all relief to which they may be entitled." We know of no good reason why the surety company, who responded to this invitation, may not maintain its petition of intervention, and have its rights, if it has any, in relation to the bank guaranty fund, determined without having previously paid the penalty of its bond.

Counsel for the Bank Commissioner concedes that this view of the law might be correct, if it were not for section 1569, Comp. Laws 1909, which provides that "the rule of the common law requiring a strict construction of the obligations of a surety shall have no application to the obligations of a surety or guarantor or indemnitor for hire, but all such obligations shall be liberally construed in accordance with the rules of the general law applicable to policies of insurance." This section does not change in any way the general rule applicable to the questions necessary

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to a decision in the case at bar. Under the old rule, a surety was a favorite of the law, his obligation was voluntarily assumed as an act of friendship, without reward, and therefore the courts were astute to relieve him of liability, and the rule applied to the construction of his obligation was *strictissimi juris*. On account of the rise of surety companies making it a business to assume these obligations for hire, the reason for the old rule passed away, and many of the courts, in dealing with the obligation of a surety for hire, have, in the absence of a statute requiring it, adopted the rule of liberal construction. The statute under consideration prescribed a new rule of construction to guide the courts of this state in construing contracts of suretyship, but does not affect the rights of a surety, where there is no ambiguity in the contract. "Written language has the same significance, and its meaning is to be ascertained by the same rules of law, where it is found in the contract of a surety as when it appears in other agreements." *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357. One of the rights of a surety is to compel his principal to pay the debt before the surety himself has paid it. This is the right the surety company is seeking to enforce.

Admitting the existence of the right, the question arises: What is the extent of the relief the surety company is entitled to? It contends that the deposit of the commissioners of the land office ought to be treated as all other deposits, and that the commissioners ought to participate pro rata in the distribution of the assets of the bank; that after the assets of the bank are exhausted, if there be a deficit, it ought to be paid out of the guaranty fund; that until the guaranty fund is exhausted, it ought not to be called upon to meet the obligations of its bond. We cannot agree with this contention. Section 323, Comp. Laws 1909, upon which it is based, reads as follows:

"In the event that the Bank Commissioner shall take possession of any bank or trust company which is subject to the provisions of this act, the depositors of said bank or trust company shall be paid in full, and when the cash available or that can be made immediately available of said bank or trust company

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is insufficient to discharge its obligations to depositors, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, as provided in section two (320), the amount necessary to make up the deficiency, and the state shall have for the benefit of the depositors' guaranty fund a first lien upon the assets of said bank or trust company and all other liabilities against the stockholders, officers, and directors of said bank or trust company and against all other persons, corporations, or firms. Such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund."

That the money deposited in the bank by the commissioners of the land office was a deposit in a broad sense is probably true; but it is clear to our minds that the commissioners of the land office are not such depositors and the funds which the law permits them to deposit in pursuance of their official duties are not such deposits as fall within the purview of section 323, *supra*. This was a special statutory deposit, with strict legislative bounds within which the depositor is required to act. The primary direction in relation to the disposition of such fund is that it shall be invested in first mortgages upon good and improved farm lands within the state of Oklahoma, Oklahoma state bonds, county bonds of this state, school district bonds of the school districts of this state, and United States bonds. Section 7942, Comp. Laws 1909.

Section 7943, Comp. Laws 1909, provides:

"Until such time as said funds may be safely and advantageously invested in the securities mentioned in the preceding section, said commissioners of the land office shall be and they are hereby authorized and empowered to deposit said sums in such banks or trust companies as they may select, but shall in every case take as security for such deposits the following classes of securities and no others: Bonds of the state of Oklahoma, bonds of the counties, school districts, cities and towns of this state, state and county warrants and approved state, county and municipal bonds of other states, bonds of the United States, first mortgages on real estate, warrants or other legal evidence of indebtedness authorized by law to be issued by municipalities in payment of paving, sewer, waterworks, electric light, or other public indebtedness and for which a special tax is authorized to be levied and collected for the payment thereof, and surety

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company bonds, and as additional security on any deposit which said board may make the said commissioners of the land office shall have authority to accept surety companies or trust companies as sureties, but in each case said board of land commissioners shall accurately investigate the value of securities offered for such deposits, provided, however, such surety company or trust company shall neither be in any manner interested directly or indirectly in any bank or trust company for which it becomes additional surety; nor shall any surety, bonding or trust company be accepted as additional surety that has more than one-fourth of said capital invested in bank stock. The said board of land commissioners may, whenever they deem it advisable, require additional securities after a deposit is made as they deem necessary to secure the safety of the deposit."

It is apparent that section 7943, *supra,* imposes many limitations upon the deposit of the permanent school fund not applicable to the ordinary deposit. Sections 323 and 7943, *supra,* were enacted at the same session of the Legislature. The first section unquestionably was passed by virtue of the police power of the state, and of course must be general in its scope, and apply to all who are entitled to that sort of protection; the second section specifically relates to the funds of the state itself, and the particular subject embraced within its purview is the temporary deposit and protection of the permanent school fund until it can be invested in the manner prescribed by law. It is well settled that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law, which might otherwise be broad enough to include it. 2 Lewis' Sutherland, Stat. Const. sec. 491.

In construing the foregoing sections as a starting point, it must be presumed that the legislative department, in its wisdom, by the enactment of the depositor's guaranty law, provided an adequate system to protect those entitled to its benefits against loss of deposits in state banks. This court has held the bank guaranty law to be sound in principle and free from constitutional objections. *Noble State Bank v. Haskell et al.,* 22 Okla. 48, 97 Pac. 590, which decision has been affirmed by the Supreme Court of the United States in *Noble State Bank v. Haskell et al.,*

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219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. If the bank guaranty law provides complete protection to those entitled to its benefits, why should the Legislature throw additional safeguards around the deposits of the commissioners of the land office, by the passage of section 7943, Comp. Laws 1909? In one of the briefs before us, counsel for another surety company, in a case involving the same propositions involved herein, anticipate this question, and answer it as follows:

"The Legislature knew that its offspring was not very strong at its birth. It knew that it would be attacked from every quarter, and it knew not how soon some federal court or state court might declare it absolutely void. It was an experiment, and, like all new ventures and experiments, it must necessarily be amended, added to, and subtracted from, in order to get it in good working shape."

Counsel in the instant case say that it is clearly required by the statute (section 323), and they argue, that the permanent school fund is such a sacred trust that the Legislature must be presumed to have deemed it of more consequence than the savings of all the people, and therefore entitled to additional protection during the time any portion of it may be temporarily deposited. Neither answer appeals to us. The first is unsatisfactory, because the conclusion reached by the court that the Legislature, in enacting the bank guaranty law, intended to, and did, provide an adequate system for the protection of the class of depositors entitled to its benefits as a police regulation, uninfluenced by unfounded fears, and by the enactment of section 7943, *supra*, it intended to and did accomplish the same purpose for deposits of any part of the permanent school fund, seems more reasonable and more in harmony with the spirit and the letter of the sections of the statute under consideration, and more nearly to advance the beneficial purposes within the contemplation of the Legislature at the time of their enactment. The second is unsatisfactory for the same reason, and for the further reason that it imputes to the Legislature either a lack of honesty or of intelligence. If it is correct, the liability of the bonding company would not accrue until the banking system of

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the state collapsed and every state bank within its borders was in bankruptcy. We cannot conceive such a condition of financial chaos. From our viewpoint, to concur with the latter contention would be tantamount to holding that the Legislature required the state banks in which any of the permanent school fund may be deposited to procure and pay for surety company bonds upon which the surety will never become liable. We are not willing to attribute such folly to the legislative department, when, without violating the canons of construction, it is not necessary to do so.

"Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or injustice, to favor public convenience, and to oppose all prejudice to public interest. 'In construing an act of the General Assembly, such a construction will be placed upon it as will tend to advance the beneficial purposes manifestly within the contemplation of the General Assembly at the time of its passage; and courts will hesitate to place such a construction upon its terms as will lead to manifestly absurd consequences, and impute to the General Assembly total ignorance of the subject with which it undertook to deal.'" (2 Lewis' Sutherland, Stat. Const. [2d Ed.] sec. 490.)

To our minds it is quite clear that the Legislature, in enacting those two sections, had in mind (1) those ordinarily entitled to protection under the police power of the state; and (2) the protection of the permanent school fund. By the first section the state in its sovereign capacity was exerting its power in behalf of its people and their interests, and not in its own behalf, and by the second it dealt with the temporary deposit and protection of the permanent school fund belonging to the state as a sovereign. As a sovereign the state must not be presumed to have exercised its police power in its own behalf to the detriment of its citizens, for whose benefit it is ordinarily exercised, unless the language of the statute itself clearly leads to that conclusion. This power cannot be exercised, except to promote the public convenience, the general prosperity, the public health, the public morals, or the public safety. *C., B. & Q. Ry. Co. v. State of Illinois,* 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; *C., R. I. & P. Ry. Co. v. State,* 23 Okla. 94, 99 Pac. 901. It must have been obvious that, after the passage of section

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7943, *supra*, large sums of the permanent school fund would necessarily be deposited in banks generally, and, in case of the failure of a state bank having such a deposit, payment out of the guaranty fund would place an additional strain upon it that might jeopardize the claims of the people for whose protection it was primarily intended. To obviate this, the Legislature, upon permitting such funds to be deposited in banks, provided a system whereby they would be completely protected against loss without impairing the usefulness of the bank guaranty fund as a police regulation. Moreover, section 7943, *supra*, authorizes the commissioners of the land office to deposit moneys not invested as required by law belonging to the permanent school fund in "such banks or trust companies as they may select," and there is no limitation upon the power of the commissioners as to where they shall make the deposit or the class of banks they shall select. In that respect they have the same freedom as the general depositor. But in the case of the permanent school fund, no matter where the deposit is made, the same class of securities is required. As it is not difficult to think of situations that would make it convenient, if not necessary, to deposit part of the permanent school fund in national banks within the state, or state or national banks outside its borders, it seems but reasonable, in view of such situations, that the Legislature would provide a system of protection amply sufficient to protect the permanent school fund against loss, wherever any part of it might be deposited, without regard to the bank guaranty fund.

Thus this wise provision of the state for protecting its permanent school fund, in case any of the banks wherein any part of it may be temporarily deposited becomes insolvent, will constitute a prop for the guaranty fund, and not a burden upon it. It must be borne in mind that the foregoing sections form a part of the bond herein involved as fully as if specifically made so by its terms. In view of that, and the conclusion we have reached as to their construction, it follows that, with the exception of the first lien of the state upon the assets, etc., of insolvent state banks, created by section 323, *supra*, for the benefit of the depositors' guaranty fund, the rights and liabilities of the surety

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company are the same as they would have been if the bond was executed to secure the deposit of a part of the permanent school fund in any bank or trust company within or without the state, not governed by the bank guaranty law.

One of the conditions of the bond is that, in the event of the default on the part of the principal, the surety shall be liable hereunder for only such proportion of the total loss sustained by the obligee as the penalty of this bond shall bear to the total penalty of all bonds and securities furnished to the obligee, and in no event shall the surety be liable hereunder in excess of the penalty of this bond. The manifest purpose of this condition is to make the surety company liable pro rata with all other surety companies securing the same deposit and with all other securities furnished the commissioners of the land office, under section 7943, *supra*. It does not contemplate participation in the guaranty fund by contribution or otherwise. Indeed, the doctrine of contribution or subrogation is not applicable to any phase of this case. The purpose of this proceeding is to compel the Bank Commissioner, acting for the principal, to pay the debt out of the depositors' fund. If this is done, the surety would be discharged and released from liability.

As, under our views of the law, the surety company was not entitled to the relief prayed for and granted by the court below, the cause must be reversed and remanded, with directions to dissolve the injunction and dismiss the petition of the surety company.

Justices WILLIAMS and HAYES being disqualified, Judge STILWELL H. RUSSELL, of the district court of the Eighth district, and Judge C. A. GALBRAITH were appointed by the Governor to sit in their stead.

TURNER, C. J., and GALBRAITH and DUNN, JJ., concur. RUSSELL, J., files a separate opinion, concurring in the conclusion reached and in the reasoning of the court on the principal question involved.

RUSSELL, Special Judge. While agreeing to the conclusion reached by his honor, Justice Kane, in rendering the opin-

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ion of the court, in reversing and remanding this cause, we feel constrained to dissent from some features and desire to express our views thereon.

The statement of this case as presented by the pleadings is fully set forth in the opinion of the court. The first question presented: Did the surety company have the right to maintain its position of intervention without having previously paid the penalty of its bond? In answer to this question, we respectfully differ and take issue with the position in the opinion. The defendant in error, being the surety company, bases its right of intervention in this suit upon the allegations of its plea that it was surety in the sum of $50,000 to protect the state of Oklahoma, by reason of a deposit of the school fund in the bank, that it was liable on said bond to the full amount of the penalty, and that the Bank Commissioner had been paying the claims of other depositors in said bank in full, without in any way protecting the said deposit for which it was surety, and that it was the purpose and intent of said Bank Commissioner to pay off other creditors in full, to the exclusion of the said deposit for which it was surety, and that the effect of said payment of other depositors would be to unjustly and wrongfully prefer creditors to the exclusion of the school fund deposit and the detriment of the surety company. In connection with the plea of intervention, they ask that the Bank Commissioner be enjoined from paying out any of the assets remaining in his hands to other creditors or depositors in preference, and the said commissioner be restrained and enjoined from repaying to the banking board the guaranty fund advanced to him, or any part thereof, prior to the paying in full of the deposit secured by the said bond of the said surety company. The decree of the honorable trial court was fully responsive to the prayer of defendant in error.

In aid of the purpose in giving expression to our views upon the question presented, as well as some other features embraced in the case, we desire to state, as succinctly and briefly as possible, what we understand the condition of affairs bringing about the contention at issue. The Legislature of the state of Oklahoma enacted what is commonly known as the "Bank Guaranty Law"

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—in other words, a system creating a depositors' guaranty fund. The system was assailed as being unconstitutional, and its legality was sustained, not only by the Supreme Court of this state, in an elaborate and exhaustive opinion by Chief Justice Williams, in the case of *Noble State Bank v. Haskell et al.*, 22 Okla. 48, 97 Pac. 590, but upon appeal to the Supreme Court of the United States, the case was affirmed. Evidently the purpose of the Legislature was to devise a plan to encourage the people and give proper security for the deposit of their earnings in banks created by that act. The system of guaranty and assurance put the state banks of Oklahoma between the depositor and possible loss. This was arranged for by the assessment plan provided for in sections 320 and 323, Comp. Laws 1909. Under the plan adopted, the Columbia Bank & Trust Company was organized as a state bank, having its assets and deposits, and without restriction as to who should be a depositor, in the sense that such term is generally understood, with the exceptions in the limitations named in the statute. The Legislature, in its wisdom, had the foresight to make special provision for the safety of the school fund, and to positively inhibit that fund from being placed anywhere without its safety being absolutely guaranteed and protected. These safeguards are provided for in sections 7942 and 7943, Comp. Laws 1909. The purpose is evident. To have permitted a deposit of the school fund without restriction or limitation would have weakened the guaranty fund, and have endangered the safety of the deposits of the people, in whose interest that fund was created. In effect, the legislation is that the school fund shall not be deposited in any bank without ample security being taken therefor for its absolute redemption in the event of a failure in the place where said fund was placed. This legislation is clear and unambiguous, and wise and patriotic as well. No one understood it any better than the defendant in error and all other such investment or security companies.

It seems that $50,000 of the school fund, placed by the commissioners of the land office in the Columbia Bank & Trust Company, was guaranteed by the defendant in error, which would

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not have been placed there but for such security, and the surety company, the defendant in error, would not have bound itself in the penalty it did, but for absolute compensation, under its own terms of compensation. Thus it is a surety for hire. We do not understand from the terms of its bond that it binds itself that, in the event of the state's failure to be reimbursed from other sources, it will only then be liable; but from the terms of the bond it absolutely guarantees the forthcoming of the school fund in the amount of its penalty, and, if default is made, its liability, already liquidated, shall be met promptly. All the conditions of the law imposing liability upon it as a surety for hire, as well as those enacted to safeguard said fund, were not only within the understanding, but the understanding on the part of the defendant in error, as if said terms and conditions had been in words expressed therein. The Columbia Bank & Trust Company failed. The assessment plan was resorted to in an attempt to supply the guaranty fund. Finally the Bank Commissioner made application to the district court for an order authorizing him to sell certain promissory notes, bonds, and other securities, being assets of the bank, upon the ground of necessity to convert said assets in order to pay off the depositors, and requested an order of sale, and such other orders in connection with the administration of the affairs of said bank that may appear from time to time to be necessary and proper, and that the Bank Commissioner, together with any and all creditors and depositors of said bank, be given and awarded by the judge thereof all relief to which they may be entitled. The prayer of the Bank Commissioner seems to have been construed into an admission that the fund for which defendant in error was security is upon the same footing with other deposits. Therefore the defendant in error felt warranted in filing its plea of intervention and asked for the relief granted, as heretofore stated, by the trial court.

In support of the plea of intervention, its attitude in this court is that its liability, if any, does not attach until all the assets of the Columbia Bank & Trust Company and the revenues and resources of all state banks in Oklahoma are exhausted, and

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then when these are exhausted there is still a deficiency to provide for the school fund for which they are surety, it would be met by the bond. On this point, this is, in brief, its contention. In our view of the case, the position of the defendant in error is an anomalous one, in this: That if their contention is correct, there is no liability, hence no necessity for a bond, because, with mathematical certainty, it is evident that, if the assets, resources, and revenues provided by the guaranty law are to be resorted to to replace the fund that defendant in error is surety for, this can be supplied, and thereby destroy any possibility of liability. It must be conceded that the defendant in error is a surety for hire, that its obligation is that of a guarantor and indemnitor for hire, and, therefore, what is known and treated and favored by the law as a friendly surety presents a different status than the attitude of defendant in error.

We believe that section 1569, Comp. Laws 1909, furnishes the reason and the rule by which the status of defendant in error is to be determined. Section 1569 declares that:

"The rule of the common law requiring a strict construction of the obligations of a surety shall have no application to the obligations of a surety or guarantor or indemnitor for hire, and all such obligations shall be liberally construed, in accordance with the rules of the general law applicable to policies of insurance."

Guaranty, as defined by the statute (section 3573, Comp. Laws 1909), is "A promise to answer for the debt, default or miscarriage of another person." In section 3583, "A guaranty is to be deemed unconditional, unless its terms import some condition precedent to the liability of the guarantor." And again, in section 3584, "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Referring to section 1569, in the opinion by his honor, Justice Kane, this language is used:

"The statute under consideration prescribes a new rule of construction to guide the courts of this state in construing con-

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tracts of suretyship, but does not affect the rights of a surety where there is no ambiguity in the contract."

We are unable to appreciate how the application of section 1569, a plain statutory provision, is to be qualified by the language, "does not affect the rights of a surety where there is no ambiguity in the contract." Either the statute has a direct application to the obligation of a surety or guarantor or indemnitor for hire, when such fact of surety or guarantor or indemnitor for hire is conceded, or should not be considered at all in treating of this question. It unqualifiedly says that the rule of the common law requiring a strict construction of the obligations of a surety, meaning a friendly surety, shall have no application to the obligations of a surety for hire, and, in fear of being misunderstood, it adds:

"But all such obligations [those of a surety for hire] shall be liberally construed, in accordance with the general law applicable to policies of insurance."

If we are to qualify the statute by a construed or patent ambiguity in the contract, and this feature is to control the admitted fact of a surety for hire, then there is no use for the statute, and it can serve no purpose in this case.

The old common-law rule, protecting friendly sureties, and declaring that a surety may compel his principal to perform the obligation when due, and that a surety may maintain an action against his principal to compel him to discharge a liability or debt for which the surety is bound, after the same has become due, has, in our opinion, no such application as will contravene or in any manner impair the unqualified and vigorous application of section 1569 to the attitude of this case. It is declared in section 3584, *supra*, that "a guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal." The defendant in error, in signing the bond, made an undertaking which embraced as clearly the sections of the statute we have quoted as if the same had been in words expressed therein. It said to the state: "We stand sponsor for every dollar named as a penalty in this bond, and we promise to answer for the default as a guarantor of payment, and are liable immediately upon the default." The only two conditions prece-

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dent to a prompt payment of the penalty were, first, that there must be a default, and the other, the amount to be ascertained. In the case at bar, both the default and the amount are conceded, and, this being so, the unconditional liability of the defendant in error is clearly established.

For the position of the defendant in error to be consistent, it should have refrained from intervening until it was ascertained that, by the bankruptcy of the state banks on the assessment plan, there was a deficiency for it to pay. From our viewpoint, in order to maintain a plea of intervention, it is presupposed that an interest exists in the subject-matter, or is at least rightfully asserted in the subject-matter of the original suit. The subject-matter of the suit at issue is an attempt to accumulate the assets of a defunct bank, to discharge its preference lien obligations due, in the first place, to the depositors' guaranty fund, and then to the depositors in said bank. The defendant in error has not only failed, but refuses, to pay any of the penalty of the bond, and it seems that it bases its action upon the supposititious theory that there might be something left for it to pay after the state banks and all other sources of revenue had been exhausted, and therefore it claims the right of intervention.

Another view in support of our position against the right of intervention, and as contending for the unqualified application of the statutory provision embraced in section 1569, is presented in the rules of the general law applicable to policies of insurance. Bearing in mind that this defendant in error stands as a surety for hire, an insurer of $50,000 of the school fund placed in a bank by its consent, and then we ask, in the event of a loss, no matter the causes producing that loss, what legal right would this surety company have to dispute the payment of that loss, or to interrupt its payment, more than would an insurance company have to stop the payment of its policy when, from natural causes, a life had been destroyed, or to look to the estate of the deceased for reimbursement after having paid the policy? An insurance company insures a life; it pays the loss upon death being ascertained. If it insures property, it pays the valuation

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upon its destruction, and why? Because its contract obligates it to do so.

We quote from the bond in this case:

"The condition of the foregoing obligation is such that, whereas, the said obligee has designated the said principal [the Columbia Bank & Trust Company] as a depository for the funds and moneys that shall come into the possession of the commissioners of the land office of the state of Oklahoma by virtue of the performance of the official duties of the said commissioners of the land office, as provided by the laws of Oklahoma and acts of Congress: Now, therefore, the condition of the above obligation is such that, if the said principal shall, during the term beginning at nine o'clock a. m. on the 18th day of May, 1909, and ending with the close of banking hours on the 17th day of May, 1910, well and faithfully perform the trust reposed in it by such designation, and shall promptly pay all funds and moneys so deposited with it, either on legal order or on check or draft of the commissioners of the land office or the secretary of the commissioners of the land office of the state of Oklahoma, and shall well and truly indemnify the said obligee from any and all losses which it may suffer or sustain during the period as aforesaid, by reason of the designation of said principal as such depository aforesaid, then this obligation to be void; otherwise, to remain in force and virtue."

The seven expressed conditions to the bond in no wise interfere with the contract entered into, and there is no complaint that any of the expressed conditions are pertinent in this case. It is true that the third expressed condition stipulates that:

"In the event of default on the part of the principal, the surety shall be liable hereunder for only such proportion of the total loss sustained by the obligee as the penalty of this bond shall bear to the total penalty of all bonds and securities furnished to the obligee, and in no event shall the surety be liable hereunder in excess of the penalty of this bond."

And to this we say that there is no complaint or plea that there are other sureties for the deposit in question. Therefore this feature needs no further reference, as the amount of the penalty and the default are both conceded.

But back to the question: "Did the surety company have the right to maintain its petition of intervention, without having previously paid the penalty of its bond?" This question is an-

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swered in the affirmative in the opinion delivered by his honor, Justice Kane, and inasmuch as, by the terms of the bond, the bank is called the principal, the surety company the surety, and the state of Oklahoma the obligee, this must be the legal relation of the parties in determining their rights and liabilities, and in support of this section 3606, Comp. Laws 1909, is invoked, which says that "a surety may compel his principal to perform the obligations when due," and section 6055, which declares: "A surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound after the same has become due." We do not dissent from this rule or this equitable principle, but we do contend it has its exceptions in application. This is the rule of *strictissimi juris,* by which the rights of uncompensated sureties are determined; but, when we look to section 1569 of the statute, we find a broader and more liberal construction, and as well a different construction, determining the rights of the insurer and insured in the case of compensated sureties. Under the common law, the rule of *strictissimi juris* applies, without regard to the question whether the surety is a gratuitous one or for hire.

The defendant in error in this case is engaged in the business for profit. In the case of *Hormel & Co. v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, where the company executed a guaranty insurance bond to indemnify the respondent against loss from the failure of the principal of the bond to perform his part of a building contract to which he and respondent were parties, it is said:

"While the bond in form resembles a contract of suretyship, it is in fact a contract of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not belong, but to which the rules governing ordinary contracts of insurance are applicable."

In 33 L. R. A. (N. S.) 513, we find in the notes to the opinion, *supra*, this text, and in support of which the author has cited numerous authorities, not only from the Supreme Court of the United States, but the federal courts and Circuit Courts of Appeals and the state courts; and this is the doctrine laid down, viz.:

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"The overwhelming weight of authority supports the proposition that the rule of *strictissimi juris,* by which the rights of uncompensated sureties are determined, is not applicable to the contracts of surety companies which make the matter of suretyship a business for profit; that their business is essentially that of insurance; and that, therefore their rights and liabilities under their contracts will be governed by the laws of insurance."

An examination of many of the authorities referred to supports the conclusions of the author. In *American Bonding Co. v. Morrow,* 80 Ark. 49, 96 S. W. 613, 117 Am. St. Rep. 72, it was declared to be now well settled that a bond of a surety company, like any other insurance policy, was to be most strongly construed against the insurer, since its language was that selected and employed by the latter, and, when doubtful or ambiguous, must be given the strongest interpretation against the insurer which it will reasonably bear. In *Carstairs v. American Bonding & T. Co.,* 54 C. C. A. 85, 116 Fed. 449, and 187 U. S. 644, 23 Sup. Ct. 844, 47 L. Ed. 346, in which a writ of *certiorari* was denied, it was declared to be "quite true that the written contracts of indemnity issued by surety companies had come to be looked upon by the courts and to be treated more as policies of insurance than as bonds." The court said:

"As contracts of indemnity, they will be liberally construed, so as to effectuate the purpose for which they were issued, and as, like policies of insurance, they are generally prepared by the bonding company, the rule of *contra proferentem* will often be applied in construing their stipulations."

In *United States Fidelity & Guaranty Co. v. Golden Pressed & Fire Brick Co.,* 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242, this language is used:

"The rule of *strictissimi juris* is a stringent one, and is liable at time to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which is undertaken for a profit, to insure the obligee against the failure of performance on the part of the principal obligor."

In *Kansas City v. Davidson,* 154 Mo. App. 269, 133 S. W. 365, it was declared that "sureties for hire were not favorites

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of the law, entitled to stand upon the strict terms of their obligations, but their status was rather that of insurers, and that their contracts should be reasonably construed to give effect to the protective purposes of their execution." In *Walker v. Holtzclaw,* 57 S. C. 459, 35 S. E. 754, it was held that "while, as a general rule, a surety was a favorite of the law, and his contract should be strictly construed in his favor, such rule had no application where the surety received compensation, and the suretyship was in the line of his regular business." The defendant in error was paid to make this bond, and a plain liability arose on it which ought to be discharged.

Referring again to the contention of the defendant in error, which, to be maintained, would result in no liability whatever for having made the bond, we are yet at a loss to understand how the rule of intervention applies. If there is no liability, then it follows that the surety company had no interest in the subject-matter involved in this case. Upon the other hand, if there is liability, it is a liquidated one, as both the amount and default are conceded. The question is not: Has it the right to intervene if it had paid the penalty, and then, with clean hands, come into court for equitable relief? It comes to court, virtually denying liability, and demanding, without paying a dollar, and without acknowledging liability, the right to stop the Bank Commissioner, operating directly under the laws of the state of Oklahoma, from accumulating and collecting the assets of a defunct principal, which are sought by him to strengthen the guaranty fund to reimburse the depositors in whose interest the law was primarily formed.

In furtherance of this view, we urge that the law was so formed as to induce people generally to deposit their earnings in the state banks. It was an open invitation to them, guaranteeing to them protection by the methods adopted in the act. But how different is the proposition under consideration! The commissioners of the land office were inhibited by positive statute from depositing this school money in that or any other bank unless it first provided against any sort of contingency whereby loss would result. Such deposits made by them were independ-

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ent and distinct, and this the defendant in error knew at the time it made the bond, because its obligation is conditioned "as provided by the laws of Oklahoma." As is said by his honor, Justice Kane, in the opinion of the court:

"That the money deposited in the bank by the commissioners of the land office was a deposit in a broad sense is probably true, but it is clear to our minds that the commissioners of the land office are not such depositors, and the funds which the law permits them to deposit in pursuance of their official duties are not such deposits, as fall within the purview of section 323, *supra*."

This being true, and the deposit not in a class with those in section 323, it but strengthens our position that it was an independent act, made in conformity with the law, which was sanctioned by the defendant in error, and for which it was paid, in response to which it obligated itself to see that $50,000 was reimbursed to the school fund upon default of the principal.

Upon what rule is the right of contribution or subrogation denied in this case, but upon the one we invoke under the authority of section 1569? Gratuitous sureties are favored by the law, and all such, when they pay in default of their principals, in the absence of ability to make their principals first respond, are entitled to contribution and subrogation, and can intervene in all proceedings where the subject-matter in which they are interested is at issue. We recognize this right in its fullest scope; but when we are called upon to assent to the proposition, under the conditions of this record, that a surety can intervene, at least without first paying the penalty it has obligated itself to discharge, we must be permitted to dissent.

The benefit legislation, designed to inspire interest in the state banks and to re-awaken the confidence of the people that a deposit of their earnings would be secure, was not, in our judgment, intended to operate as a shield in the protection of those who, for compensation and hire, would become surety for the safety of a special deposit. The depositors' guaranty fund is created by contributions from the state banks, and the state, in its sovereign capacity, in order to protect the guaranty fund and have the contributors to it to an extent indemnified against unusual assessments, holds a first and preference lien upon

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all the assets of said bank and all liabilities against the stockholders, officers, and directors of said bank, and against all other persons, corporations, or firms, and provides that such liabilities may be enforced by the state for the benefit of the depositors' guaranty fund. At the risk of repetition, we insist that this first lien and the purposes for which the lien was created were known by the defendant in error when it guaranteed the deposit in question, and, as insisted by counsel for plaintiff in error, the obligation of the surety company to pay the deposit is subject to this first lien.

If the commissioners of the land office had no right to deposit the school fund without taking security therefor, which they did not, then in such case the contention can be safely maintained that the special deposit in this case would have no claim upon the depositors' guaranty fund, because of its independent and distinctive features. The Columbia Bank & Trust Company, although the principal, is not the beneficiary, of the bond; nor is the penalty of the bond a part of the assets of the bank. The state is the obligee of the bond, for the benefit of the school fund, and therefore the penalty of the bond is an asset of the school fund. The lien held by the state upon the assets of the bank, as we contend, does not apply to this special deposit; it has no relation to it, therefore, leaving the matter as a contract in effect between the commissioners of the land office and the surety company, the defendant in error, which not being complied with, the commissioners of the land office have the right to demand immediate payment of the penalty, the default and amount being conceded.

The commissioners of the land office looked to the solvency of the surety company, as they are required to do by the law, and are not required to investigate the solvency of the place in which the money is to be deposited. This is the duty of the surety company, and in this is conceded the duty of the commissioners to look to it for the payment of the deposit. Banks as depositaries were not relied upon; the depositors' guaranty fund was not looked to, as it is plainly meant by section 7943 that banks and trust companies are to be used as a receptacle for the

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deposit only upon the condition that, when not forthcoming the surety or indemnitor for such forthcoming will promptly supply the default. In our view of the law, on the record of the case as presented, the plea of intervention has no standing in this case and should not have been allowed.

If the right of intervention, without having paid the penalty of the bond, is permitted, as is stated affirmatively in the opinion of the court, then it seems to us that this case ought not to be reversed, and why? Because there is involved in the right of intervention the proposition that the school fund deposit is upon a footing with other depositors, and is entitled to a pro rata distribution of the guaranty fund to reimburse such deposit; and if such reimbursement can be had, as provided in the guaranty law, then there is nothing for the defendant in error to pay. The intervention plea is in; in the opinion of the court it has the right there, and, being in, the issues raised by it have to be determined. Its permitted presence is a predetermination of the right to a distribution of that fund. The issues in the case being thus settled, all that is left is to apply the remedy provided by law for the reimbursement of depositors all alike.

The contention of defendant in error, that the resources provided by law shall be exhausted before it is called upon to pay the penalty or any part thereof, follows as a legal sequence to the admitted right of intervention. Intervention conceded carries with it all the other rights granted to it by the honorable trial court, and in the face of such a concession we fail to understand why the judgment of the lower court should not be affirmed. But holding views diametrically opposite to the right of intervention as sought in this case, and to the right of defendant in error to have the resources of the state banks exhausted before liability accrues, compels us to dissent.

We concur in the conclusion reached, that this case should be reversed and remanded; and it is our holding that the plea of intervention should be dismissed, and that the restraining order issued in this case by the honorable trial court be dissolved.

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DRENNAN v. WARBURTON.

No. 1485. Opinion Filed March 12, 1912.

Rehearing Denied September 17, 1912.

(122 Pac. 179.)

1. **APPEAL AND ERROR — Review — Amendment of Pleading.** Leave to amend pleadings at any stage of the proceeding is largely in the sound discretion of the trial court, and rulings on such questions will not be disturbed on appeal, unless it appears that the court abused its discretion.

2. **PLEADING—Amendment.** It is not error to refuse an amendment which will permit the party requesting the same to introduce evidence tending to establish a usage or custom which contravenes a written contract upon which the cause of action is predicated.

3. **APPEARANCE—Special Appearance.** An appearance, in order to be special, must be shown to be such by a proper designation and entitlement.

(Syllabus by the Court.)

Error from District Court, Alfalfa County;
M. C. Garber, Judge.

Action by D. C. Warburton against R. H. Drennan, doing business as the R. H. Drennan Grain Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Everest, Smith & Campbell, for plaintiff in error.

George W. Partridge and *Talbot & Owen,* for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover the market value of certain wheat. Upon trial to a jury there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

It seems that the petition was filed upon the theory that the defendant was bound to buy the wheat from the plaintiff at

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any time at the option of the plaintiff for the prevailing market price, under the following contract:

"This contract witnesseth, by and between R. H. Drennan Grain Company, party of the first part, and D. C. Warburton, party of the second part: Party of the second part has this day stored with party of the first part one thousand, six hundred and twelve bushels and fifty pounds of wheat testing sixty pounds, for which party of the first part agrees to keep for party of the second part at the rate of one cent per bushel for the first thirty days and one-half of one cent for each succeeding thirty days thereafter until such time as party of the second part desires to dispose of said wheat. Party of the first part hereby agrees to buy said wheat from party of the second part at any time for the prevailing market price at such time, deducting for storage as above stated. Party of the second part has the privilege of selling such wheat to any person he may desire upon the payment to first party of the sum of two cents per bushel for loading such wheat into cars."

The answer of the defendant was to the effect that the defendant was only liable as bailee, and that as the elevator in which the wheat was stored was destroyed by fire through no fault of his, and as the offer to sell the wheat was not made until after the fire, he was absolved from all liability. The reply was a general denial. On the trial the evidence conclusively showed that the elevator was destroyed by fire prior to the time the plaintiff offered his wheat for sale to the defendant and demanded payment therefor. The case, however, was tried upon the theory that, if the evidence showed that all the wheat belonging to the plaintiff was shipped from the elevator and sold by the defendant prior to the fire, the plaintiff was entitled to recover.

The following instruction was given by the court without objection or exception by either party:

"There being no evidence in this case that the fire which destroyed the defendant's elevator was caused by any negligence upon his part, he is not liable to the plaintiff for any of plaintiff's wheat which he has shown by the evidence to have had stored in his elevator at the time of the fire and which was destroyed thereby."

There was evidence tending to show that a large portion, if not all, of the plaintiff's wheat had been sold and shipped by the

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defendant prior to the fire, whereupon the defendant asked leave to amend his answer as follows:

"Now, if the court please, at this time, the defendant asks leave to amend its answer in order to conform with the facts, showing the custom of mingling this grain with other grain, and keeping wheat on hand at all times in order to meet storage contracts, sufficient grain of like kind and quality to meet those contracts, and that this defendant at all times did that, complied with that custom and practice, and that, furthermore, it was the prevailing custom for elevator and warehousemen generally and particularly at Ingersoll, Okla., and in that neighborhood, to mingle the grain deposited under contracts, such as the contracts sued upon in this case, with the grain of others and with the grain purchased by the defendant himself, and that it was known and understood by the public generally in their dealings with elevator men and warehousemen that the particular grain which was deposited under those contracts would not be returned to the holder of the contract, but that the custom and practice was for the elevator men or warehousemen to return to them the same quality of grain, same quantity, of like quality and kind."

This request was refused by the court, and that is one of the grounds of error assigned. It is quite apparent that the case by the consent of the parties finally resolved itself into an action for conversion. The foregoing instruction was given without objection, and the request of counsel for leave to amend conclusively points to that conclusion, and upon that theory we will examine the record.

Leave to amend pleadings at any stage of the proceedings is a matter that rests largely in the sound discretion of the court. We would be justified in holding that the record does not show an abuse of discretion in the present case, and decide this assignment upon that ground alone.

But, in addition, the amendment asked, if granted, would permit the defendant to lay a predicate for establishing a custom in direct conflict with the terms of the contract of storage, and this, as is well settled, cannot be done. The contract stipulated that the defendant for a fixed compensation should keep the wheat for the plaintiff until such time as the plaintiff should desire to dispose of it. There is no ambiguity about this language, and it is therefore not subject to construction. If the

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contract involved is regarded as a contract of bailment, which it probably is, the defendant became liable for the conversion of the wheat stored immediately upon selling and shipping it out contrary to the terms of the contract, as the jury must have found he did.

Several other assignments of error are predicated upon rulings of the court relative to instructions given by the court and instructions requested by the defendant and refused. As rule 25 of this court (20 Okla. xii, 95 Pac. viii) in relation to setting out instructions objected to and refused has not been complied with, the court will not review any of the instructions given or refused.

The assignment of error based upon the action of the court in overruling defendant's motion to quash the summons cannot be sustained, for the reason that the action of the defendant in the premises constituted a general appearance. The record discloses that the defendant entered what he called a special appearance for the purpose of the motion only, and moved the court to quash the summons, and dismiss the cause, upon the ground that the defendant was a resident of Oklahoma county, and jurisdiction over his person could not be had by service of summons on his agent in the county where the suit was commenced; it appearing that the defendant is an individual doing business under the name and style of R. H. Drennan Grain Company, and not a partnership or corporation. There are some authorities to the effect that a defendant who separately or in conjunction with a motion going only to the jurisdiction of the court over his person invokes the power of the court on the merits, or moves to dismiss, appears generally, but we think there is another and more substantial ground upon which to base our ruling herein. It seems that no exception was taken to the ruling of the court on the original motion to quash, and thereafter the defendant filed a motion to set aside the former order, wherein it is set out that the defendant appears by his attorneys and moves the court to set aside the ruling of the court, etc. This does not pretend to be a special appearance. Practically all the authorities hold that an appearance, in order to be special, must

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be shown to be such by a proper designation and entitlement. *Collier v. Falk,* 66 Ala. 223; *Flake v. Carson,* 33 Ill. 518; *Deshler v. Foster,* 1 Morris (Iowa) 403; *Kleinschmidt v. Morse,* 1 Mont. 100; *Baxter v. Arnold,* 9 How. Prac. (N. Y.) 445; *Coatsworth v. Thompson,* 5 N. Y. St. Rep. 809; *Godfrey v. Douglas County,* 28 Ore. 446, 43 Pac. 171; *Lowe v. Stringham,* 14 Wis. 222; *Pry v. Hannibal, etc., Ry. Co.,* 73 Mo. 127; *Montague v. Marunda,* 71 Neb. 805, 99 N. W. 653.

Finding no reversible error in the record, the judgment of the court below must be affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

ST. LOUIS & S. F. R. CO. v. DAVIS.

No. 2726. Opinion Filed January 9, 1912.

Publication Withheld Until September Term, 1912.

(120 Pac. 562.)

APPEAL AND ERROR—Case-Made—Authority of Successor of Trial Judge. A successor of the judge before whom an action was tried has the power to grant an extension of time for making a case-made, suggesting amendments and fixing the time within which the case must be signed and settled, provided the same is done before the expiration of the time granted by the retiring judge.

(Syllabus by the Court.)

Error from District Court, Lincoln County; Roy Hoffman, Judge.

Action by Eugenia Davis against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. On motion to dismiss. Overruled.

W. F. Evans, R. A. Kleinschmidt, and *J. H. Grant,* for plaintiff in error.

S. A. Cordell and *W. L. Johnson,* for defendant in error.

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KANE, J. The verdict of the jury was returned on December 9, 1910. On December 13, 1910, the defendant (plaintiff in error) filed its motion for a new trial, which was overruled on January 5, 1911. Thereupon the court allowed the defendant (plaintiff in error) 90 days from that date in which to make and serve a case-made, and the plaintiff (defendant in error) ten days thereafter to suggest amendments; the case-made to be settled on five days' notice given by either party. On March 9, 1911, the term of the regular trial judge, to wit, Hon. Roy Hoffman, expired. On March 29, 1911, his successor in office, Hon. Charles B. Wilson, Jr., by order extended the time within which to make and serve the case-made to June 5, 1911, the plaintiff to have ten days thereafter within which to suggest amendments, and the case-made to be settled upon five days' notice. Thereafter, to wit, June 5, 1911, the case-made was duly made and served on counsel for the plaintiff. Thereupon counsel for the plaintiff in writing waived the right to suggest amendments to said case-made, and consented that the same be settled without notice, and on June 8, 1911, said case-made was duly signed and settled by Hon. Roy Hoffman, the judge who tried said cause.

We think the motion to dismiss ought to be overruled. Following the construction of the same statute, before its adoption by the territory, by the Supreme Court of the state of Kansas, the territorial Supreme Court, in several cases which have been followed by this court, held: That an ex-judge is not authorized by section 6075, Comp. Laws 1909 (section 4445, St. Okla. 1893), to sign and settle a case-made, if, at the expiration of his term of office, the time for making and serving case-made had expired and no time for settling had been fixed before his retirement. *Barnes v. Lynch*, 9 Okla. 11, 59 Pac. 995; *Burnett v. Davis*, 27 Okla. 124, 111 Pac. 191; *Richardson et vir v. Beidleman et al.*, *ante*, 126 Pac. 818. But none of these courts have held that the successor of an ex-judge is not authorized to extend the time for making and settling a case-made, provided such extension is made within the time fixed by law or by an order of the ex-judge before the expiration of his term. Indeed, the Supreme Court of Kansas

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has held to the contrary. *Hulme v. Diffenbacher,* 53 Kan. 181, 36 Pac. 60. Whether an order for extending the time for making and serving a case-made be granted depends upon circumstances after the trial, and as to the propriety of making such an order the new judge has as good opportunities for deciding as the old. In the case at bar the trial judge granted time within which to make and serve the case-made, and before the expiration of that period his successor extended the time, also granting time to suggest amendments and requiring the case-made to be settled upon five days' notice. It has been held by this court, and correct, we think, that the time stated in the notice of time and place of settling a case is "the time fixed for * * * settling and signing a case," contemplated by the statute, *supra.* In the case at bar the time fixed by the notice was waived by stipulation. The effect of the agreement between counsel in that regard was to change the time fixed in the notice for settling and signing to any time within the period which lies between the date of service of the case and the expiration of the time for taking the appeal. The construction contended for by the movant would require notice of time and place of settling a case to be given, for the purpose of fixing the time for signing and settling the case, when the primary reason for giving it was lacking, to wit, to enable opposing counsel to be present to see that his suggestions, if proper, were incorporated in the case-made.

The motion to dismiss is overruled.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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BRADY *et al.* v. BANK OF COMMERCE OF COWETA *et al.*

No. 2818. Opinion Filed January 9, 1912.

Publication Withheld Until September Term, 1912.

(121 Pac. 250.)

APPEAL AND ERROR—Settling Case-Made. Motion to dismiss overruled, on the authority of **St. L. & S. F. R. Co. v. Davis**, **ante**, 120 Pac. 562.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action between A. C. Brady and Maude Brady and the Bank of Commerce of Coweta and others. From the judgment, the Bradys bring error. On motion to dismiss. Overruled.

F. F. Lamb, for plaintiffs in error.

Owen & Stone and *T. E. Lipscomb,* for defendants in error.

KANE, J. This cause comes on to be heard upon the motion to dismiss filed by the defendants in error. In support of their motion counsel say:

"That this case is in all respects similar to the cases of *Hamilton v. Havercamp* [*post,* 124 Pac. 73], dismissed by this honorable court, and *Richardson v. Beidleman* [*ante,* 126 Pac. 818], and should be dismissed for the same reasons."

The case at bar differs from the foregoing cases in this: At the time the case-made was served, which was within the time granted by the judge who tried the cause before his retirement from office, the defendants in error waived their right to suggest amendments and agreed that the case-made might be presented for settlement without notice. It seems to be more analogous to *St. L. & S. F. R. Co. v. Davis, ante,* 120 Pac. 562, wherein it is held that the effect of waiving notice of time and place of signing and settling the case-made is to change the

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definite time fixed for that purpose by the notice to any time within the period which lies between the date of service of the case-made and the expiration of the time for taking the appeal.

As the retiring judge signed and settled the case-made in the instant case within such time, the motion to dismiss the appeal must be overruled.

TURNER, C. J., and HAYES and WILLIAMS, JJ., concur; DUNN, J., absent, and not participating.

HAMILTON v. HAVERCAMP.

No. 2482. Opinion Filed November 14, 1911.

On Rehearing May 14, 1912.

Publication Withheld Until September Term, 1912.

(124 Pac. 73.)

APPEAL AND ERROR—Record—Case-Made—Settlement and Signing—Authority of Judge After Expiration of Term. An ex-judge is not authorized by section 6075, Comp. Laws 1909 (section 4445, St. Okla. T. 1893; section 4742, Wilson's Rev. & Ann. St. 1903), to sign and settle a case-made, if, at the expiration of his term of office, the time for making and serving case-made has expired, or no time for signing and settling the case-made has been fixed before his retirement.

(a) The amendment of March 9, 1910 (Sess. Laws 1910, c. 39, sec. 1, pp. 59, 60), to section 6075, **supra**, did not change this rule when the ex-judge, or the judge who tried the cause, was living, or not otherwise incapacitated from settling and signing the case-made.

(Syllabus by the Court.)

Dunn, J., dissenting.

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by Ellen Hamilton against Bennie D. Havercamp. Judgment for defendant, and plaintiff brings error. Motion to dismiss appeal overruled.

Frank F. Lamb, for plaintiff in error.

J. C. Stone and *Lex V. Deckard,* for defendant in error.

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WILLIAMS, J. On March 31, 1910, and in due time, a motion for new trial was filed by the plaintiff (plaintiff in error). On the 2d day of April, 1910, said motion having been overruled, plaintiff was allowed 90 days in which to make and serve a case-made, the defendant 30 days thereafter to suggest amendments; the case-made to be presented for settlement by either party upon giving the other ten days' notice. On the 13th day of June, 1910, the time in which to make and serve a case-made was extended to August 1, 1910. On July 21, 1910, the time for making and serving case-made was further extended to October 21, 1910. On September 30, 1910, the case-made was duly served upon counsel for the opposite side. On September 30, 1910, the attorneys for all parties agreed, in writing, that the case-made as served was a full, true, correct, and complete case-made.

The term of office of the Hon. William L. Barnum, who was the regular judge of the district court of said judicial district, and who tried the cause, having expired on January 9, 1911, said case-made, on January 20, 1911, was signed and settled by the Hon. Wade S. Stanfield, his successor in office. On the 30th day of March, 1911, said case-made was also presented to Judge Barnum, who also settled same.

It appears that neither by notice nor otherwise was the time fixed for the presentation of said case-made for settlement, prior to the expiration of Judge Barnum's term of office. Under the holding in *Richardson et vir v. Beidleman et al., ante*, 126 Pac. 818, the trial judge neither being dead nor otherwise incapacitated from settling the same, his successor was not authorized to settle same.

In the same case, it was also held that the retiring judge was not authorized to settle such case-made, except when, at the time of his retirement from office, the time allowed for making and serving the case-made, or the time fixed for the presentation and settling of the same, had not expired.

Under the authority of said case, the appeal must be dismissed.

TURNER, C. J., and HAYES and KANE, JJ., concur; DUNN, J., dissenting.

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ON REHEARING.

WILLIAMS, J. On rehearing, it has been called to our attention for the first time that the record contains a stipulation that "the defendant waives the right to suggest amendments in said case-made, and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the plaintiff in error that the judge of said court settle the same and order the same certified to the clerk of the district court and filed according to law."

In *St. Louis & S. F. R. Co. v. Davis, ante,* 120 Pac. 562, is is said:

"Thereafter, to wit, June 5, 1911, the case-made was duly made and served on counsel for the plaintiff. Thereupon counsel for the plaintiff, in writing, waived the right to suggest amendments to said case-made, and consented that the same be settled without notice; and on June 8, 1911, said case-made was duly signed and settled by Hon. Roy Hoffman, the judge who tried said cause. * * * It has been held by this court, and correctly, we think, that the time stated in the notice of time and place of settling a case is 'the time fixed for * * * settling and signing a case,' contemplated by the statute, *supra.* In the case at bar, the time fixed by the notice was waived by stipulation. The effect of the agreement between counsel in that regard was to change the time fixed in the notice for settling and signing to any time within the period which lies between the date of service of the case and the expiration of the time for taking the appeal. The construction contended for by the movant would require notice of time and place of settling a case to be given, for the purpose of fixing the time for signing and settling the case, when the primary reason for giving it was lacking, to wit, to enable opposing counsel to be present to see that his suggestions, if proper, were incorporated in the case-made."

In *Brady et al. v. Bank of Commerce of Coweta et al., ante,* 121 Pac. 250, this ruling was adhered to.

The petition for rehearing is granted, and the motion to dismiss the appeal is accordingly overruled.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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STATE *ex rel.* REARDON, *Co. Atty.*, v. HARPER, *Clerk of District Court.*

No. 2124. Opinion Filed November 28, 1911.

On Rehearing, March 12, 1912.

Second Rehearing Denied June 4, 1912.

Publication Withheld Until September Term, 1912.

(123 Pac. 1038.)

1. **STATUTES—Title of Act.** Same as that in **Jefferson v. Toomer,** 28 Okla. 658, 115 Pac. 793.

2. **OFFICERS—Compensation —Fixing Salary—Constitutional Law.** There being no provision of the statutes or the Constitution fixing the compensation for the several clerks of the district court prior to the passage of the act by the special or extraordinary session of the Legislature on March 19, 1910 (Sess. Laws 1910, c. 69, pp. 129, 139), the action of said Legislature in fixing the compensation of such officers is not in conflict with Const. art. 23, sec. 10, forbidding the enactment of a law diminishing or increasing the emoluments or salary of a public officer after his election or appointment or during his term of office.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by the State, on the relation of Edward E. Reardon, County Attorney, for writ of mandamus to Hathaway Harper, Clerk of the District Court. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Sam Hooker, Co. Atty., *H. M. Peck,* Asst. Co. Atty., and *A. F. Moss,* for plaintiff in error.

Ledbetter, Stuart & Bell and *Wm. P. Harper,* for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court entered in an agreed case (section 6051, Comp. Laws 1909).

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The stipulated facts are as follows:

"First. Said E. E. Reardon is the duly elected, qualified and acting county attorney of said Oklahoma county, and said Hathaway Harper is now, and has been at all times since November, 1907, the duly elected, qualified, and acting clerk of the district court of said Oklahoma county.

"Second. Said Hathaway Harper, as such district clerk, has not filed with the board of county commissioners the verified report of the work of his office for the month of August, 1910, mentioned in section 9 of chapter 69 of the Session Laws of the Legislature of the state of Oklahoma, same being section 9 of Senate Bill No. 1 of the Extraordinary Session of the Second Legislature of the state of Oklahoma, said Senate Bill being reported at pages 129 to 143 of said Session Laws, said report being required by said section 9 to show the total fees collected in each case.

"Third. The position taken by the plaintiff is that said report should be made and filed in accordance with the provisions of said section 9, and the position of the defendant is that he is not required to make and file said report because:

"(a) Said above-described Senate Bill No. 1 is unconstitutional and void, because the title of said bill fails to comply with the requirements of section 57 of article 5 of the Oklahoma Constitution.

"(b) Said Senate Bill No. 1 is unconstitutional and void because the title to said bill is vague, uncertain, and indefinite, and fails to show the contents of said bill, and fails to comply with the provisions of section 57 of article 5 of the Oklahoma Constitution.

"(c) Because said Senate Bill No. 1 covers numerous subjects, and is violative of that portion of the provisions of section 57 of article 5 of the Oklahoma Constitution providing that every act of the Legislature shall embrace but one subject, which shall be clearly expressed in the title, except general appropriation bills, general revenue bills, and bills adopting a code, digest or revision of statutes.

"(d) Because said Senate Bill No. 1 is vague, uncertain, and indefinite in its provisions, and is void for want of certainty.

"(e) Said Senate Bill No. 1 does not affect this defendant, because of the provisions of section 10 of article 23 of the Constitution of Oklahoma, providing that no change shall take place in the salary or emoluments of any public official after his election or appointment or during his term of office, unless by operation of law enacted prior to such election or appointment.

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"(f) Because said Senate Bill No. 1, if it is constitutional, is not in force and effect at the present time.

"(g) Because said Senate Bill No. 1, if it is constitutional, will not be in force and effect until after the official publication by the United States government of the population of Oklahoma county as determined by the census of the year 1910.

"(h) Because the caption of said Senate Bill No. 1 does not include or cover the making of said report by defendant.

"Fourth. And for the purpose of having the courts determine the controversy between the plaintiff and the defendant as to the constitutionality and force of said Senate Bill No. 1, and particularly of said section 9 of said Senate Bill, as to which the plaintiff and the defendant are unable to agree, it is mutually agreed between the plaintiff and the defendant that this controversy be submitted to said court, and by lawful appeal to the higher court, if either party desire such appeal, it is agreed that, waiving summons, this case be presented to said superior court of Oklahoma county for hearing and determination as to the law, taking the facts as above stated, and that it be presented to the Supreme Court of this state if either party appeals as above set forth.

"Fifth. In case it should be decided that said Senate Bill No. 1 is constitutional and is now in force, a peremptory writ of mandamus shall issue against defendant requiring him to make and file said report in accordance with the provisions of section 9 of said Senate Bill No. 1, and that if it should be decided that said Senate Bill No. 1 is not constitutional, or, if it is constitutional, that it is not now in force, that judgment be entered in favor of the defendant. But, as above shown, either party is to have the right of appeal to the Supreme Court if so desired."

Under the agreed facts, the questions (1) as to the invalidity of the bill on account of defective title (section 57, art. 5, Const.), and (2) that, if said bill is valid, it does not affect the compensation of the defendant in error, on account of the provisions of section 10, art. 23, of the Constitution, are raised.

The first question is covered by paragraphs "a," "b," "c," and "d" of the agreed facts. The act referred to in the agreed statement as Senate Bill No. 1, being an act approved on the 19th day of March, 1910 (Sess. Laws 1910, c. 69), entitled "An act relating to certain county and district officers," has been held by this court to be valid, and not in conflict with section 57 of

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article 5 of the Constitution. *Jefferson v. Toomer, Clerk,* 28 Okla. 658, 115 Pac. 793; *Pottawatomie County v. Reasor,* 29 Okla. 209, 116 Pac. 801.

As to the second contention, section 18 of the Schedule is as follows:

"Until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township officers, not otherwise provided by this Constitution, shall be as now provided by the laws of the territory of Oklahoma for like named officers. * * *"

By section 2, art. 17, of the Constitution, the office of clerk of the district court is created in each organized county of this state. It is, therefore, contended by defendant in error that, the clerk of the district court under the state government being a county officer, section 18 of the Schedule applies, and the salary and compensation by said section provided for such office is that "provided by the laws of the territory of Oklahoma for like named officers." That the act of the legislative assembly of the territory of Oklahoma, providing fees and compensation for the clerks of the district courts, was void, is well settled. *Pitts v. Logan County,* 3 Okla. 719, 41 Pac. 584; *Bohart et al. v. Anderson,* 24 Okla. 82, 103 Pac. 742, 20 Ann. Cas. 142; *United States v. MacMillan,* 165 U. S. 504, 17 Sup. Ct. 395, 41 L. Ed. 805. Section 13 of the Organic Act (Act May 2, 1890, c. 182, 26 St. at L. 88), providing that "there shall be allowed to the attorney, marshal, clerks of the Supreme and district courts the same fees as are prescribed for similar services by such persons in chapter sixteen, title Judiciary, of the Revised Statutes of the United States," was held in *Bohart et al. v. Anderson, supra,* to be locally inapplicable, and therefore neither extended to nor remaining in force after the erection of the state.

Section 2 of the Schedule provides:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

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Section 21 of the Enabling Act, approved June 16, 1906 (Act June 16, 1906, c. 3335, 34 St. at L. 277), provides that "all laws in force in the territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act or by the Constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States." It being settled by *Bohart et al. v. Anderson, supra,* that section 13 of the Organic Act of the territory of Oklahoma and section 828 of chapter 16, tit. 13, of the Judiciary Act (1 U. S. Comp. St. [1901] p. 635), fixing the fees or compensation for the clerks of the district courts of the United States, are locally inapplicable and neither extending to nor remaining in force after the erection of the state, and the laws of the territory of Oklahoma not having provided any salary or compensation for clerks of the district courts, it follows that until the enactment of said law known as the "County Fee and Salary Law," being an act entitled "An act relating to certain county and district officers," (chapter 69, pp. 129, 143, Sess. Laws 1910), no law was in force in this state fixing the compensation or salary of the clerks of the district courts. In *Bohart et al. v. Anderson, supra,* it was held that:

"When the compensation of an officer is not fixed by law at the time he renders a service, but it clearly appears that it was the intention of the lawmakers that he should receive a reasonable compensation, to be fixed by law, until it is so fixed he is entitled to a reasonable compensation, to be determined by the proper tribunal."

Under this rule, the question arises as to whether section 10 of article 23 of the Constitution prevented the Legislature from enacting a law fixing the compensation or salary of the defendant in error after his election or during his term of office. In *Merwin v. Board of Commissioners,* 29 Colo. 169, 67 Pac. 285, it is said:

"Section 30 of article 5 of the Constitution forbids the enactment of a law which increases or diminishes the salary or emoluments of a public officer after his election or appointment. After Merwin was appointed to his office, and some of the services were

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performed for which recovery is sought, the board fixed his salary at $1 a year. The general fee act, which prescribes certain fees for district attorneys, was in force when plaintiff was appointed. The argument is now made that the fees pertaining to the office of district attorney, and to which plaintiff says he would be entitled in the absence of a salary fixed for him by the board, would amount to more than the salary fixed after he entered upon the discharge of his duties; hence, in effect, his salary was diminished after his appointment. The point is not good for several reasons. Nowhere do we find that fees have been fixed for deputy district attorneys, though fees for district attorneys have been (Sess. Laws 1891, p. 221) prescribed. But plaintiff is not suing for fees belonging to his principal. Unless the board of commissioners has fixed the deputy's salary, or in its discretion, allowed certain fees for the deputy's services, he is entitled to nothing. In other words, unless the board makes him an allowance of fees, or gives him a salary, there is no provision of law for his compensation. Neither the act of 1885 (Sess. Laws 1885, p. 176) nor of 1889 (Sess. Laws 1889, p. 150), which are the only statutes authorizing the appointment of deputy district attorneys, fixes a salary, or provides a compensation or fee; and we are cited to no statute in which such compensation is mentioned, except, as just stated, the sections which the plaintiff himself attacks. If these statutes are invalid, then no provision by law has been made for compensation of deputy district attorneys. As was well said by Mr. Justice Wilson in *Otero Co. v. Wood* [11 Colo. App. 19, 52 Pac. 214], *supra:* 'The right of an officer to have payment of his costs made by the county is purely statutory. At common law the costs made by the defendant, if paid at all, were paid by him. The costs of the prosecution, no matter what the event of the trial, were unpaid. On the part of the state or sovereign, there was neither payment nor recovery of costs.' *Bynum v. Board,* 100 Ind. 90; *Board v. Harman,* 101 Ind. 551. Public office is not a contract, nor the result of a contract; and, where compensation is not fixed at time of election or appointment; it may be thereafter fixed, and, until fixed, no right to compensation, either fees or salary, attaches. Mechem, Pub. Off. secs. 855-858."

See, also, *State v. McDowell,* 19 Neb. 442, 27 N. W. 433; *Purcell v. Parks,* 82 Ill. 346; *Rucker v. Supervisors,* 7 W. Va. 661; *Stuhr v. Hoboken,* 47 N. J. Law, 147.

As to the office of district clerk, where no compensation had been fixed, we conclude that the fee and salary bill of March

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19, 1910, became effective 90 days after the adjournment of the session of the Legislature at which it was passed.

The judgment of the trial court is reversed, and this cause remanded, with instructions to set aside the judgment and to award a peremptory writ of mandamus against the defendant in error in favor of the plaintiff in error.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

ON REHEARING.

The defendant in error in his petition for rehearing on account of section 33 of the county fee and salary act of March 19, 1910 (Sess. Laws 1910, c. 69, p. 141), which provides that "the salary of all county officers shall be based upon the federal census of 1910, and each additional ten years thereafter," insists that said act did not go into effect until after the federal census of 1910 had been taken pursuant to Act Cong. July 2, 1909, c. 2, 36 St. at L., p. 1 (U. S. Comp. St. Supp. 1911, p. 557). Section 1 of said act (36 St. at L., p. 1) provides:

"That a census of the population, * * * shall be taken by the director of the census in the year nineteen hundred and ten and every ten years thereafter."

Section 20 of said act (36 St. at L., p. 7) provides:

"That the enumeration of the population required by section one of this act shall be taken as of the fifteenth day of April."

Section 32 of said act (36 St. at L., p. 10) provides:

"That the director of the census is hereby authorized, at his discretion, upon the written request of the Governor of any state or territory, or of a court of record, to furnish such Governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies, and one dollar additional for certification."

The salary and fee act of March 19, 1910, was evidently framed in view of the act of Congress of July 2, 1909, and that was that the federal census would be taken as of the date of April 15, 1910. Under section 58 of article 5 of the Constitution, all acts, except in case of an emergency expressed in the act,

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are to take effect 90 days after the adjournment of the Legislature. It is not essential to determine here as to whether the Legislature might provide that a certain act should not take effect or be applicable until a certain future date.

Section 1 of the act of March 19, 1910 (Sess. Laws 1910, p. 129), provides:

"The clerk of the district court, the clerk of the superior court and the clerk of the county court shall charge and collect the following fees for service by them respectively rendered and none others. * * *"

Section 9 of said act provides:

"At each monthly meeting of the board of county commissioners the clerk of the district court, the clerk of the superior court, the clerk of the county court, the county clerk and the register of deeds shall each file a verified report of the work of the preceding month showing the total fees charged in each case and the total fees collected in each case, and shall pay all of such fees into the county treasury and file duplicate receipts therefor with the county clerk."

Section 17 of said act provides:

"All county, township and district officers who are required by law to make monthly or quarterly reports to the board of county commissioners who fail or refuse to make such reports, or who make a false or fraudulent report, shall be deemed guilty of a misdemeanor and in addition to his punishment he shall forfeit his office, and when any such officer shall fail or refuse to account for or to pay over any money in his official capacity, he shall be deemed guilty of embezzlement, and in no case shall any county officer retain any perquisites of his office; and provided, further, that if any officer neglect or refuse to charge the fees provided by law, he shall forfeit double the amount thereof to be deducted from his salary, or to be collected by civil action against such officer or his bondsmen."

Section 30 of said act is as follows:

"The clerk of the district court, the clerk of the superior court, the county clerk, the county treasurer, and the register of deeds shall receive as their full compensation the following salaries. * * *"

Section 31(a) of said act provides:

"The fees herein provided for the clerk of the district court, the clerk of the superior court, and the clerk of the county court, the sheriff and the county attorney as provided in this act, and

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all costs in the prosecution whether of the grade of misdemeanor or felony, shall in case of conviction be taxed as costs in the case and a judgment rendered therefor; and award execution for the collection of the same as on execution in civil actions."

Section 32 of said act provides:

"The salary of all county officers, their clerks and deputies, shall be paid monthly out of the county treasury by order of the board of county commissioners; provided, however, that no salary shall be allowed or paid until their reports are filed and approved by the board of county commissioners, as in this act provided."

Section 33 of said act provides:

"The salary of all county officers shall be based upon the federal census of 1910, and each additional ten years thereafter."

There is nothing in said act to indicate that it was not intended for it to go into effect as provided by section 58 of article 5 of the Constitution. Said act, having gone into effect 90 days after the adjournment of the Legislature, applied to every county in the state. The fact that the federal census of 1910 may not have been officially promulgated as to Oklahoma county on the date that said act went into effect, to wit, June 17, 1910, did not prevent said act from applying to said county. Under the salary and fee act of March 19, 1910, it was the duty of the defendant in error as clerk of the district court of said county to file a verified report of his work for the preceding month, showing the total fees charged in each case and the total fees collected in each case, and to pay all such fees into the county treasury. Then the county owed him his salary for such month, but said salary could not be computed until the federal census had been promulgated, which was to be taken as of the date of April 15, 1910. This construction is reasonable, and gives a fair construction to the entire act. Especially is this so as to the office here in question where there was no statute in force regulating the charges therefor.

It follows that the petition for rehearing will be overruled.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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PERSONS v. PENN *et al.*

No. 4360. Opinion Filed October 1, 1912.

(127 Pac. 384.)

MANDAMUS—Election Officers—Ballots. By reason of section 3266, Comp. Laws 1909, as amended by act of the Legislature, entitled "An act providing the time, manner and means of holding primary elections" (Sess. Laws 1909, p. 270), a person cannot compel by mandamus the state election board to place upon the official ballot for a general election his name as a nominee and candidate of a political party for representative in Congress at large, where his name was not printed upon the ballots of such party at the primary election, and his candidacy for nomination by such party was not voted upon by the members of the party at the primary election, although such person filed his petition within the time prescribed by statute to have same printed upon the tickets of such political party as a candidate for nomination by that party for said office.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Application by E. L. Persons for a peremptory writ of mandamus to C. C. Penn and others as the state election board of Oklahoma. From a judgment denying the application, the applicant brings error. Affirmed.

H. M. Gray, for plaintiff in error.

Chas. West, Atty Gen., and *C. J. Davenport,* for defendants in error.

HAYES, J. This proceeding in error is prosecuted from a judgment of the superior court of Oklahoma county denying the application of plaintiff in error for a peremptory writ of mandamus, commanding defendants in error, who constitute the state election board, to print plaintiff in error's name upon the ballots for the general election to be held on November 5, 1912, as a nominee and candidate of the Progressive party for representative in Congress at large. The alternative writ was issued by

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the trial court, and, after defendants in error filed their answer thereto, evidence was taken upon the issues formed by the writ and answer. The facts presenting the questions of law to be determined here are that plaintiff in error duly filed with the secretary of the state election board within the time provided by law for filing such petitions his petition for nomination as a candidate of the Progressive party for the office of representative in Congress at large from this state at the primary election on August 6, 1912. No other person filed a petition as candidate for nominee of the Progressive party for said office. The state election board failed to provide any tickets for the Progressive party at said primary election, and plaintiff's name as such candidate was not submitted to nor voted upon by the voters at the primary election. Upon refusal of the election board to print his name as nominee and candidate of the Progressive party for congressman at large upon the election tickets for the general election to be held on November 5th next, plaintiff in error brought this action for mandamus. Defendants resisted the application in the lower court upon the ground, first, that the Progressive party was not in existence at the time plaintiff filed his petition for nomination at the primary, and that such party was not organized until after the period provided by the statute for filing applications for nominations by political parties at the recent primary election had expired; and, second, that, if the Progressive party existed as an organized party at said time, plaintiff was not voted upon as a candidate for nomination by said party as one of its candidates for congressman at large, and the board is therefore unauthorized by the statute to place his name upon the tickets for the general election as a candidate of said party. Assuming the Progressive party had such organization or existence at the time plaintiff filed his petition for nomination as to entitle it under the statute to select and nominate as a political party at the primary election in August candidates for congressman at large, we are of the opinion that defendants' second contention is sound, and for that reason the trial court committed no error in denying the peremptory writ.

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Section 3266, Comp. Laws 1909, as amended by act of the Legislature, entitled "An act providing the time, manner and means of holding primary elections" (Sess. Laws 1909, p. 270), reads as follows:

"Political parties in this state shall select or nominate their respective candidates for the various state, district, county, township and precinct offices by a primary election as herein provided for *and no candidate's name shall be printed upon the official ballot for any general or special election at which all or any of the state, district, county, township or precinct officers are to be elected unless such candidate shall have been nominated as herein specified* (italics ours); provided, that this provision shall not exclude the right of nonpartisan candidates to have their names printed upon such official ballots as hereinafter provided for."

It is to be observed that plaintiff does not seek to have his name placed upon the ballots as a nonpartisan candidate, but as a nominee of a political party. The foregoing portion of the statute italicized by us plainly and specifically prohibits that any person's name shall be printed upon the official ballot at any general election as a candidate of any political party, unless he shall have been nominated by that party by a primary election as provided for in the subsequent provisions of the statute. By other sections of the statute, as amended by the foregoing amendatory act, it is provided that any person desiring to become a candidate before a primary election for a political party nomination for the office of representative in Congress shall file within a time specified by the statute his petition with the secretary of the state election board, asking that his name be printed upon such political party's ticket for nomination; and by section 20 of said amendatory act it is provided, when the election board has completed its tabulation of the returns, the person having received the highest number of votes for any office in the political party before which he was declared a candidate shall be declared the nominee for such office, and be given a certificate of nomination for the same, which shall entitle him to have his name placed on the official ballot at the ensuing election as the nominee of such party for such office. The provisions of the statute not only authorize the different political parties to nominate their candidates for office to be voted upon at any election by a primary election

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for that purpose, but make it mandatory that such candidate shall be nominated in that manner. It is the contention of plaintiff that, because no one filed as a competitor for nomination as candidate for the office which he seeks, he should be now treated as the nominee of his party, although no expression was made upon his candidacy by the voters of his party at the primary election. Assuming that plaintiff was entitled to have his name placed upon the ballot for the primary election, we can find no provision of the statute that gives him a clear right to be declared the nominee of his party, without ever having been voted upon at the primary, although he was without a competing candidate.

It appears that some of the states in providing for primary elections for the nomination of candidates by political parties have enacted statutes providing that, where only one person files as a candidate for the nomination of any one office, the name of such person shall not be placed upon the ballot for the primary election, but that such person shall be declared and treated as the nominee, without being voted upon, but the statute of this state contains no such provision. Plaintiff filed his petition in time; but when the election board failed to place his name upon the ballot of the Progressive party, and, in fact failed to provide any ballots for the Progressive party, neither he nor said party took any steps by proceeding in court toward compelling the board to prepare such ballots. We cannot presume, in the absence of any action on the part of the Progressive party to nominate candidates for the office which plaintiff seeks, that if it had acted at the primary, it would have selected plaintiff as its candidate. The statute contemplates no such presumption; for if it had some exception would have been made to the provision that no candidate's name shall be printed upon the official ballot at the general election, except he be nominated in the manner the statute prescribes, to wit, by the voters of the party at a primary election.

It is plaintiff's contention that he should be treated as the nominee and candidate of the Progressive party, because of the alleged neglect of duty by the state election board to place his name upon the ticket for the primary election; but, assuming

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that the board was delinquent in this respect, still we think no such right follows to plaintiff, because it was his duty to see that such tickets were printed by instituting proceedings in the courts to compel the performance of such duty, and we cannot say that, if plaintiff's name had been printed upon a ticket at the primary, he would have received any votes, and would therefore have been entitled to a certificate of nomination. For aught the record discloses to this court, the Progressive party may not have desired to make any nominations whatever at the primary election at which plaintiff sought to be a candidate; and the fact that no steps were taken by that party toward securing a submission of a list of candidates for nominees at the primary, except the sole act of plaintiff in filing his petition, indicates that it was not the desire of the party to nominate a ticket. As the statute now exists, one can make himself a candidate for the nomination of a political party by filing his petition to have his name placed upon the primary ticket as a candidate for such nomination, but he cannot make himself the nominee of that party, without being voted upon as such candidate at the primary. We have found no case wherein the facts and the statutes involved make it squarely in point as an authority in this case; but the views we have here expressed and the conclusion we have reached find support in the following cases: *Phillips v. Curtis,* 4 Idaho, 193, 38 Pac. 405; *Atkeson v. Lay,* 115 Mo. 538, 22 S. W. 481; *State ex rel. Woody v. Rotwitt,* 18 Mont. 502, 46 Pac. 370.

We conclude, under the facts in this case, that the Progressive party has not at any primary election nominated plaintiff as its candidate for representative in Congress at large from this state, to be voted upon at the ensuing general election; and he has therefore failed to establish any clear legal right to the writ he seeks, and the judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; KANE, J., not participating.

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GOSS *et al.* v. SORRELL *et vir.*

No. 1036. Opinion Filed October 8, 1912.

(127 Pac. 435.)

BROKERS—Agency for Corporation and Person Dealing With It—Procuring Loan—Former Decisions Followed. This case is governed by **Bell et ux. v. Riggs et al.** 34 Okla. ——, 127 Pac. 427, and **Porter v. Wold,** 34 Okla. — —, 127 Pac. 432, recently decided by this court, but not yet officially reported.

(Syllabus by the Court.)

Error from District Court, Custer County; James R. Tolbert, Judge.

Action by Laura Sorrell and another against E. A. Goss and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Geo. T. Webster and *H. N. Boardman,* for plaintiffs in error.

Phillips & Mills, for defendants in error.

WILLIAMS, J. This action was commenced by the defendants in error, Laura Sorrell and Jerry Sorrell, as plaintiffs, against the plaintiffs in error, E. A. Goss and K. G. Hamlyn and the Winne Mortgage Company and Scott E. Winne, as defendants, to remove a cloud upon the title of certain realty. According to the allegations of plaintiffs' petition, they applied on September 10, 1907, for a loan of $1,140 to the Winne Mortgage Company. The firm of Winne & Winne was composed of Scott E. Winne alone, who was at the time of the making of the note the president and general manager of the Winne Mortgage Company. The plaintiffs made their note and mortgage to the Winne Mortgage Company, and delivered the same to it at Wichita, Kan., where the note and mortgage were accepted and approved. On November 12, 1907, the company submitted the application, note, mortgage, and abstract to W. W. Bennett, of Rockford, Ill., an investment broker, by sending them to his office in said

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city, with a view of selling them to any one who might buy, and particularly with a view of selling them to the plaintiffs in error, E. A. Goss and K. G. Hamlyn. In said application is contained the following clause:

"I hereby constitute and appoint Winne & Winne of Wichita, Kansas, my agents, to procure the necessary abstract of title to the land, to show clear and unincumbered title, in fee simple, thereto at my expense, and to charge me for the same and at my expense, to pay off all liens on said land, and to send the money or draft to make such payment at my risk. I hereby authorize them to procure the loan herein applied for from the company to which this application is made, or from any other source from which they can get the sum herein applied for on the terms contained in this application."

W. W. Bennett approved the security, relied upon the application as to the statements therein made, and believed by reason of previous dealings with the same company that the company was the real owner of the note and mortgage, and thereupon advised the plaintiffs in error, who were his clients, to take the note and mortgage at its face, which they did, by paying to said Bennett the full face value, and he, in turn, remitted the purchase price to the Winne Mortgage Company, and the same was received by Scott E. Winne, its president, and the money was deposited by him in the Land Credit State Bank of Wichita, Kan., to the credit of the Winne Mortgage Company, and $140 of said sum was credited on the books of the Winne Mortgage Company to the commission account, being charged against the defendants in error, and they were further charged with $12 on account of abstract and recording fees, and they, defendants in error, were credited with the balance, all of which took place between November 12 and November 18, 1907. Scott E. Winne, who was then the disbursing officer of said company, neglected to cause said money to be remitted to defendants in error, and something like five months thereafter he left the state of Oklahoma, a fugitive from justice, having embezzled all the funds of said company, and, among others, the money of these defendants in error. This suit was not brought by defendants in error until about April 28, 1908, and the assignment of the mortgage to plaintiffs in error was placed on record November 20, 1907.

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It is admitted that the plaintiffs in error bought the note and mortgage in good faith, without any notice that the defendants in error had not received their loan, but it is also contended on the part of the defendants in error that the note is nonnegotiable under the laws of Oklahoma, notwithstanding it is to be performed, that is, paid in Wichita, Kan. The note is in words and figures as follows:

"$1,140.00. Arapaho, Oklahoma Ter., Sept. 12, 1907. Ten years after date, for value received, I promise to pay to the order of the Winne Mortgage Company eleven hundred and forty and no-100 dollars at the office of said company in Wichita, Kansas, with interest at the rate of six per cent. per annum from date until paid, payable annually on the first of each year, excepting the last installment, which shall be due and payable with the principal. If this note is sent to the Winne State Bank at Clinton, Oklahoma Territory, or to any other bank for collection, I agree to pay exchange and collection expenses, and this note shall not be deemed paid until the funds are actually received by payee. Interest coupons are hereto attached representing the interest from date to maturity, which with this principal note are secured by a mortgage deed of even date. If any installment of interest is not paid at maturity, this principal note and all interest due thereon shall become due and payable at once, without notice, at the option of the holder of this note. This note is executed upon the condition that partial payments in any amount not exceeding one-fifth of the principal in any one year will be received at any time, at the office of this company in Wichita, Kansas, and that the interest will be rebated from the date of such payments. [Signed] Laura Sorrell, Jerry Sorrell."

The mortgage contains the following clause:

"That they do further agree that the contract embodied in this mortgage and the note secured thereby, shall in all respects be governed, construed and adjudged according to the laws of the territory of Oklahoma at the date of their execution."

Section 797, Wilson's Rev. & Ann. St. 1903 (section 1106, Comp. Laws 1909), is as follows:

"A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

It seems that said note would be negotiable under the laws as they existed at that time in the states of Kansas and Illinois.

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The proceeds of said note and mortgage were never paid by the mortgage company over to Winne & Winne, or to Scott E. Winne as a member of said firm.

The facts in this case are identical with those in *Bell et ux. v. Riggs et al.* [34 Okla. ——] 127 Pac. 427, in an opinion by Rosser, C., recently decided by this court, but not yet officially reported. The syllabus is as follows:

"(1) Scott E. Winne was the active member of the partnership of Winne & Winne, and was also president and manager of the Winne Mortgage Company. Riggs and wife made application to Winne Mortgage Company for a loan, and the application contained the statement that Winne & Winne were appointed their agents to obtain the loan. Riggs and wife signed a separate instrument to the same effect. *Held,* that Winne & Winne were in fact acting for the Winne Mortgage Company, and that Riggs and wife were not chargeable with the loan until it had been paid or tendered them, and that a payment of the amount of the loan by the Winne Mortgage Company to Winne & Winne was not a payment to Riggs and wife.

"(2) Where a mortgage on land in Oklahoma given to secure a note payable in Kansas provided that both note and mortgage should be governed and construed according to the laws of Oklahoma Territory, the question of the negotiability of the note will be determined by the same rule as if it had been both executed and payable in Oklahoma Territory.

"(3) A note, otherwise negotiable in form, contained the following clause: 'Interest coupons are hereto attached representing the interest from date to maturity, which with this principal note are secured by a mortgage deed of even date. If any installment of interest be not paid at maturity, this principal note and all interest due thereon shall become due and payable at once, without notice, at the option of the holder of this note. This note is executed upon the condition that partial payments in any amount not exceeding one-fifth of the principal in any one year, will be received at any time, at the office of said company in Wichita, Kansas, and that the interest will be rebated from the date of such payments.' *Held,* that this clause rendered the note nonnegotiable."

Also, in *Porter v. Wold* [34 Okla. ——] 127 Pac. 432, in an opinion by Rosser, C., recently decided by this court, the facts being practically the same as those disclosed by this record, paragraph 2 of the syllabus is as follows:

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"(2) The application for a loan stated that the applicant made 'application to the Winne Mortgage Company for a loan,' and further stated, 'I offer as security for the loan a first lien upon real estate situated,' etc. It also contained a provision purporting to appoint Winne & Winne agents for the applicant, and, also, the following, 'I hereby authorize them to procure the loan herein applied for from the company to which this application is made, or from any other source from which they can get the sum herein applied for, on the terms contained in the application.' *Held*, that, if the agency attempted to be conferred had been otherwise valid, its terms conferred no authority on Winne & Winne, or the Winne Mortgage Company, to procure the money by transferring the note and mortgage, and that the application contemplated that the applicant would get the money from the person to whom she executed the note and mortgage."

It follows that the judgment of the lower court must be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

HUNTER v. HINES *et al.*

No. 4039. Opinion Filed October 8, 1912.

(127 Pac. 386.)

1. **APPEAL AND ERROR—Review—Insufficiency of Record.** Plaintiff having waived all errors of law, if any, committed on the trial, by failing to file a motion for a new trial, and no error being apparent on the face of the record, or otherwise urged, nothing is presented to this court for review.

2. **SAME—Motion for New Trial.** Plaintiff in error in his petition in error failing to assign as error the overruling of the motion for a new trial, no question is properly presented in this court to review errors alleged to have occurred in the progress of the trial in the lower court.

(Syllabus by the Court.)

Error from District Court, Kiowa County; J. R. Tolbert, Judge.

Action between A. J. Hunter and Ula M. Hines and others. From the judgment, Hunter brings error. Dismissed.

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Hays, Carpenter & Hughes, and *J. E. Terral,* for plaintiff in error.

O. B. Riegel, for defendants in error.

WILLIAMS, J. Counsel for defendants in error insists that this proceeding in error should be dismissed (1) for the reason that the record does not disclose that a motion for a new trial was filed or passed upon, and (2) that the petition in error does not allege the overruling of a motion for a new trial as ground for a review and reversal of the judgment.

The motion is well taken as to both grounds. *Deering v. Meyers,* 29 Okla. 232, 116 Pac. 793; *Burrus v. Funk,* 29 Okla. 677, 119 Pac. 976; *Cox v. Lavine,* 29 Okla. 312, 116 Pac. 920; *McDonald et al. v. Wilson,* 29 Okla. 309, 116 Pac. 920; *Meyer v. James,* 29 Okla. 7, 115 Pac. 1016.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

CONNELL *et al.* v. GRAY.

No. 4342. Opinion Filed October 8, 1912.

(127 Pac. 417.)

COLLEGES AND UNIVERSITIES—Agricultural and Mechanical College—Powers and Liabilities. The board of regents of the Agricultural and Mechanical College of this state have authority, where not prohibited, either expressly or impliedly, by law, to collect an incidental fee to bear expenses necessary and convenient to accomplish the objects for which the institution was founded.

(a) All males and females, who are citizens of the state, and who are between the ages of twelve and thirty years, are entitled to be admitted to all the privileges of the institution and instruction therein.

(b) No incidental expense may be charged and collected as a condition precedent to entrance.

(c) A reasonable sum may be required to be deposited by each student as a condition precedent to entrance, to be held as earnest money for all negligent breakage or damage to the property of said institution whilst a student, to be refunded at the end of the term or session, provided it is not consumed by breakage or damage to the property of the institution by such student.

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(d) The board is authorized to prescribe a uniform and require it to be worn by the students.

(e) It may require that each student shall be provided with such uniform prior to the entrance, or that a reasonable deposit be made to procure the same.

(Syllabus by the Court.)

Error from District Court, Payne County;
A. H. Huston, Judge.

Action by Ruth Gray, by J. T. Gray as next friend, against J. H. Connell, President of the Oklahoma Agricultural and Mechanical College of the State of Oklahoma, and another. Judgment for plaintiff, and defendants bring error. Modified, and affirmed.

Chas. West, Atty. Gen., and *W. C. Reeves,* Asst. Atty. Gen., for plaintiffs in error.

Freeman E. Miller, for defendant in error.

WILLIAMS, J. The defendant in error, as plaintiff, instituted an action in the district court of Payne county, by her next friend, alleging in her petition that the plaintiff in error J. H. Connell was the duly selected, appointed, and acting president of the Agricultural and Mechanical College of the state of Oklahoma, a public educational institution established and maintained by said state under and pursuant to the Constitution and laws of said state, and is and has been such president thereof at all times mentioned in said petition, and as such president is and has been at all such times the chief executive officer of said college under the laws of said state, and the rules and regulations pertaining thereto, ordained and established by the board of regents of said college, and the duties for him prescribed by the said board of regents, and that the defendant J. E. Hasselle, plaintiff in error, is the duly selected, appointed, and acting registrar of said college, and that as such registrar it is his duty, as prescribed by the board of regents of said college, to enroll, admit, register, and certify as students entitled to instruction therein, under the direction, control, advice, and authority of the president of said college, all persons being citizens of the state of Oklahoma, and be-

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tween the ages of twelve and thirty years, if they apply as students therefor; and the plaintiff states that on the 2d day of September, 1912, she being a citizen of Oklahoma, and of the age of sixteen years, and having applied for instruction as a student in said institution, did then and there comply with all the lawful rules and regulations prescribed by the board of regents and the faculty of said institution, and did present her certificate of qualifications entitling her to admission as such student to the committee on entrance of said college, and the said committee on entrance of said college did then and there examine the same and in all things approve the same, and by its chairman did duly certify her as entitled to admission as a student in said college; that thereafter, in compliance with and in conformity to the rules and regulations prescribed by the board of regents of said college, she duly presented said certificate to the said president and said registrar (plaintiffs in error) on the 2d day of September, 1912, and her application for admission therein to instruction, and demanded, requested, and prayed that she be enrolled as a student in said college and admitted to instruction therein, and registered and certified, as required by the laws of the state and the rules and regulations of said board of regents, as a student of said college, and entitled to instruction therein; but the plaintiff states that the defendants, acting together and conspiring to deprive her of her lawful right to admission as a student to the privileges of said college and to instruction therein, as provided by law, and in violation of their duties as provided by law, did on said day refuse to admit her to instruction in said college, or to enroll, register, or certify her as a matriculated student in said institution, and as such student entitled to instruction in said college; that, notwithstanding this plaintiff had complied with all the lawful rules and regulations relating or pertaining to the admission of citizens of the state of Oklahoma as students entitled to be admitted to instruction therein, the said defendants, unlawfully conspiring and acting together for the purpose of depriving plaintiff of her property, did unlawfully, illegally, willfully, without authority of law, and in violation of law, demand of the plaintiff that she pay over to and deposit with the said president and said

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registrar, or some other person acting in collusion with them, the sum of $5 in good and lawful money of the United States, worth and of the value of $5, as a condition precedent to the admission of the plaintiff as a student of said college, and as a condition precedent to enrolling her as a student thereof and admitting her to instruction therein.

Plaintiff further states that said defendants further demand the payment of other and further fees from the plaintiff and others in like situation with her as conditions of admission to instruction in said institution, to wit, a deposit of $6, with which the defendants shall purchase for her a certain dress and equipment for use by her in the gymnasium of said institution, and a like fee of all other students for like dress and equipment for such use; also from all male students a deposit of $17 for the purchase of a suit or uniform for use in the military department of the said college while receiving instruction in said department, such gymnasium and military instruction being compulsory under the rules and regulations of such college; also a fee of $2 per term for the use of a typewriting machine by students in the commercial department, and $2 per term for the use of a piano in the music department for each student about to take instruction, said pianos and said typewriting machines being the property of said college and a part of its equipment, and being owned by it as fully and to the same extent as it owns its grounds, campus, and other buildings, all such fees in the various classes and departments being demanded and required from students applying for instruction in said college, and being exacted by defendants before said defendants will register, accept, admit, or certify any such student as entitled to admission to instruction therein.

Defendants, answering, admit:

"That the said Ruth Gray, on September 2, 1912, applied to the defendants for admission into the said Oklahoma Agricultural and Mechanical College, and that admission into the college was denied said Ruth Gray for and on account of her failure and refusal to pay the term fees of $5 to be charged all students, of which $2.50 is not returnable, and the balance to become a trust fund, which may be returned at the end of the term, unless absorbed by charges for breakage and repairs made against the individuals and the student body, as provided by the orders, rules,

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and regulations promulgated by the faculty of said college, and duly approved by the state board of agriculture of the state of Oklahoma, the board of regents of said college. That said defendants, in demanding such term fee of $5, acted under and by virtue of the following proceedings of the faculty, of April 11, 1912, which was confirmed by the college committee of the board of regents on August 14, 1912, which proceedings were in words and figures as follows: 'Moved that a fee of $5.00 per term be charged all students, of which $2.50 shall not be returnable, the balance to be a trust fund, which may be returned at the end of the term, unless absorbed by charges for breakage and repairs made against individuals and the student body. This to take the place of all fees, with the exception of music and typewriting fees, and that the change be published in the catalog.' Further answering, defendants state that the said term fee of $5 is in no sense a tuition, and will not be used for that purpose. The funds arising from the collection of this fee will be expended for the purchase of supplies and materials consumed by students and for services rendered and for the support of student organizations necessary to the highest efficiency of the college, viz., the Y. M. C. A., the Y. W. C. A., student literary societies, the students' college paper, the athletic association for women, the athletic association for men, and similar student enterprises. That the fund arising from the collection of such fees will be wholly insufficient to meet all the expenses incident to the enterprises named."

On application, a temporary injunction was granted the plaintiff (defendant in error) against the defendants (plaintiffs in error), which is, in part, as follows:

"* * * It is considered and ordered by the court that the defendants herein, J. H. Connell, president of the Oklahoma Agricultural and Mechanical College of the state of Oklahoma, and J. E. Hasselle, registrar thereof, be and the same are hereby enjoined and restrained until the further order of the court herein from demanding, requiring or compelling the payment of any money or sum of money to them or into their hands or into the hands of any one else by the plaintiff as a condition for her admission to instruction as a student in the said Agricultural and Mechanical College of the state of Oklahoma; that they be, and they are hereby, enjoined and restrained from demanding, requiring, and compelling the payment of any money or sums of money to them, or into their hands, or into the hands of any one else, by any person being a citizen of the state of Oklahoma and entitled to admission to instruction under the rules and

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regulations prescribed by the board of regents of said college, other than prescribing the payment of money as a condition for admission. It is further ordered by the court that the said defendants may, and they are hereby expressly permitted to, require from students taking military drill or gymnasium instruction in said institution proper uniforms and clothing as prescribed by the board of regents and faculty, and necessary and proper for use in said instruction, and may accept from persons taking any such instruction deposits of money for the furnishing of such uniforms and equipment for such purpose, and may require deposits from students taking instruction in any department of the college, wherein breakage to equipment and supplies may occur, or other damages that are liable to be made, the same to be held as a trust fund, and to be repaid to the student depositing the same in case the student shall not cause sufficient damage or breakage to absorb the amount thereof, and in case he shall cause such damage or breakage same shall be prorated and the balance returned to him."

This proceeding in error is prosecuted to reverse this order. The Oklahoma Agricultural and Mechanical College was organized or provided for by the first Legislative Assembly of the territory of Oklahoma. St. Okla. 1890, pp. 82, 85; article 12, c. 103, Comp. Laws 1909. The provisions of the act of Congress, approved July 2, 1862 (Act July 2, 1862, c. 130, 12 St. at L. 503; 2 Fed. St. Ann. p. 850), and the supplemental act, approved March 2, 1887 (Act March 2, 1887, c. 314, 24 St. at L. 440; 1 Fed. St. Ann. p. 9 [U. S. Comp. St. 1901, p. 3218]), were accepted; the territory of Oklahoma obligating itself to comply with all of the provisions of said act. The state is obligated to carry out these provisions. Section 4, art. 1, Const.; sections 1 and 2 of the Schedule. Nothing in said acts of Congress, or the act creating said institution, requires said college to be maintained free of tuition, and that students be admitted therein for instruction free from all fees and charges, unless it be section 25 of said act (section 253, St. Okla. 1890), which provides:

"Males and females shall be admitted to all the privileges of the institution hereby established, and all citizens of the territory of Oklahoma between the ages of twelve and thirty years shall be admitted to instruction therein, if they apply as students therefor."

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In Kansas the statute provides:

"Admission into the university shall be free to all the inhabitants of this state, but a sufficient fee shall be required from nonresident applicants, to be fixed by the board of regents, and no person shall be debarred on account of age, race or sex." (Section 11, c. 258, Kansas Laws 1889.)

In *State of Kansas ex rel. Attorney General v. Board of Regents of the University of Kansas et al.*, 55 Kan. 389, 40 Pac. 656, 29 L. R. A. 378, it was held that the board of regents had no power to collect a fee of $5, or any other fee, for the use of library, or exclude students from the use of the library for the nonpayment of such fee, and that the assumption by the board of the power to collect such fees and to exclude students from the library for the nonpayment thereof was an unwarranted assumption of corporate powers, from the exercise of which they will be ousted by that court in a suit brought in the name of the state by the Attorney General. In the opinion it is said:

"It is contended that the board of regents may yet collect a reasonable fee for the wear and tear of the books; that the word 'free' must be taken with qualifications; that in the nature of things there must be rules and regulations; that each and every student cannot be permitted to occupy the chancellor's seat at his desk, or any other place in the university he may choose at his own sweet will, but that the regents and the chancellor have a right to make proper regulations; and that the fee imposed is no more than is reasonable to preserve and protect the library. We fully agree with so much of the claim of the learned counsel as asserts the right of the regents and the chancellor to make all necessary and proper rules and regulations for the orderly management of the school, the preservation of discipline therein, and the protection of its property, but that it may require the payment of money as a condition precedent to the use of the property of the state is another and a different claim, with which we do not agree. If the regents may collect $5 for the use of the library, why may they not collect also for the use of the rooms of the building and of its furniture? Why may they not impose fees for walking in the campus, or for the payment for instructors? All these things have cost money. There are expenses incurred by the state on behalf of the students in connection with every department of the school. If they may collect for one thing, it is not apparent why they may not collect for another. It is suggested that supplies are furnished in

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the laboratories for the use of students, which are destroyed; that vessels and implements may be broken; and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented, and express provision therefor is made by chapter 226, Laws of 1895. The library is provided for permanent use. Each volume, with proper care, may be used by a great number of students and for a long term of years. The library as a whole is subjected to wear and tear, but only in the same manner as furniture and other properties furnished by the state. The buildings, furniture, library, and apparatus, as well as the services of the faculty, are furnished and paid for by the state. These, we hold, under the provisions of the statute quoted, are free to all residents of the state who are entitled to admission into the university. The regents have no power to raise a fund, to be managed and disposed of at their discretion, by charging fees for the use of the library, or under any other claim for any other purpose, unless expressly authorized to do so by law."

The following cases are cited by counsel for plaintiffs in error as supporting their contention: *State ex rel. Priest v. Regents of the University of Wisconsin*, 54 Wis. 159, 11 N. W. 472; *City of New Orleans v. Board of Administrators of Tulane Educational Fund*, 123 La. 550, 49 South. 171; *Bryant v. Whisenant et al.*, 167 Ala. 325, 52 South. 525, 140 Am. St. Rep. 41.

In the Wisconsin case the question turned largely upon the construction of legislative acts, and has weight as an authority in this case only to show that the board of regents, where not prohibited, either expressly or impliedly, by law, have the power to collect incidental fees to bear expenses necessary and convenient to accomplish the objects for which the institution was founded. There the board were permitted to levy and collect incidental fees for the heating and lighting of the public halls and rooms of the university; no provision having been made by law for such to be done at the expense of the state.

In the Louisiana case it was held that free tuition was a bar to the collection of the registration fee, but not to the collection of a laboratory fee. In the opinion the court said:

"An amount is claimed as a laboratory fee. There is a difference between the laboratory fee and the matriculation fee. The last is general, but entirely proper; while, as relates to the laboratory fee, each student admitted to the laboratory has a

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direct personal interest. He is brought in direct contact with the department. He is a consumer of the articles placed before him for his use. He uses, breaks, and destroys them, and he at other times keeps them in a safe and entire state. It may be said that they are in the nature of personal expenses. No student should object to paying them. They are more particularly personal, because not all students enter or are admitted to the laboratory. There are those who remain content enough never to enter the laboratory rooms, with a view of availing themselves of the opportunities for self-improvement offered. The more ambitious for self-improvement are admitted, and these can, we imagine, extend their ambition slightly further, and provide the pittance, the payment of which will only make them more appreciative of the benefit conferred."

In the Alabama case it was held:

"Code 1907, secs. 1678-1993, relating to the public school system, contemplates free tuition to all minor residents more than seven years old; but, in the absence of statutory provision for a fund of heating and lighting schoolrooms, the county boards of education may prescribe a reasonable method for raising such fund, *e. g.*, by imposing a reasonable incidental fee upon pupils, and delegate its authority to the district boards and teachers to enforce the method adopted."

In the opinion it is said:

"And when the statute makes no provision for a fund for this purpose, the county boards have the right to prescribe a reasonable method for the raising and collection of this fund, and to delegate the authority to the district boards and teachers to enforce said rules. We also think that the requirement of a reasonable incidental fee for this purpose, as a condition precedent to attendance, is contemplated by the statute, in the absence of any special provision for same. * * *"

The board of regents are authorized to dispose of "all monies appropriated by the state Legislature and by Congress." Section 8364, Comp. Laws 1909.

Section 3, art. 1, c. 3, Sess. Laws 1907-08, p. 5, provides as follows:

"The board of agriculture shall be the board of regents of all agricultural and mechanical colleges; it shall select the professors, presidents and other employees of each of said schools, fix their salaries and prescribe their respective duties. It shall prescribe the course of study in each of said schools, and shall

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ordain and establish such rules and regulations for the management thereof, not inconsistent to (with) the laws of the state, as they may deem necessary and proper."

The board of regents have the implied power to do everything necessary and convenient, where it is not prohibited, either expressly or impliedly, by law, to accomplish the objects for which the institution was founded. To do this the property, grounds, buildings, halls, and apparatus, furniture, etc., must be reasonably preserved against negligent destruction. To require a reasonable deposit by each student as a condition precedent to entrance, to cover any such breakage or damage thereto, to be refunded at the close of the term or session in the event no breakage or damage is done by such student, appears to be necessary and reasonably within the implied powers of said board. The fee of $2.50 for such purpose is not unreasonable.

It is conceded by counsel for all parties in this proceeding that the board has authority to prescribe the kind of uniform and require same to be worn by the students. Such being the case, it is within the power of said board to require the students, at the time of entrance, to provide themselves with such uniform, or make a reasonable deposit to cover the cost of same.

As to the Young Men's and the Young Women's Christian Associations, it is not permissible for said board to make it compulsory upon any student in said institution to contribute to the maintenance of the same. Section 5, art. 2, of the Constitution of this state, provides:

"No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such."

The first legislative act passed toward the separation of church and state was that by Virginia in 1786, entitled "An act for establishing religious freedom," which was brought about by Thomas Jefferson. In the Virginia Constitution of 1830 (section 11, art. 3) it is provided:

"No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any

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man be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish, or enlarge their civil capacities. And the Legislature shall not prescribe any religious test whatever; nor confer any peculiar privileges or advantages on any one sect or denomination; nor pass any law requiring or authorizing any religious society, or the people of any district within this commonwealth, to levy on themselves or others any tax for the erection or repair of any house for public worship, or for the support of any church or ministry, but it shall be left free to every person to select his religious instructor, and make for his support such private contract as he shall please."

This constitutional provision was but an embodiment of the act of 1786, establishing religious freedom. Section 5, art. 2, *supra,* appears to be identical with article 2, sec. 7, Const. Mo. 1875. The first prototype of it, however, seems to be in the Constitution of Michigan of 1835, article 1, sec. 5, which was reincorporated in article 4, sec. 40, of the Michigan Constitution of 1850. In Michigan it has been held that the reading of extracts from the Bible emphasizing the moral precepts of the ten commandments, as a supplemental text-book, which was used at the close of the sessions, and from which any pupil might be excused upon the application of parents or guardian, was not violative of such constitutional provisions. *Pfeiffer v. Board of Education of City of Detroit,* 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536. The following states support the Michigan rule: *Moore v. Monroe,* 64 Iowa, 367, 20 N. W. 475, 52 Am. Rep. 444; *Billard v. Board of Education,* 69 Kan. 53, 76 Pac. 422, 66 L. R. A. 166, 105 Am. St. Rep. 148, 2 Ann. Cas. 521; *Hackett v. Brookville School Dist.,* 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36; *Donahoe v. Richards,* 38 Me. 379, 61 Am. Dec. 256; *Spiller v. Inhabitants of Woburn,* 12 Allen (Mass.) 127; *Church v. Bullock* (Tex.) 109 S. W. 115, 16 L. R. A. (N. S.) 860. The following states support the contrary rule: *State ex rel. Freeman v. Scheve,* 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L. R. A. 927; *State ex rel. Weiss v. District Board of School*

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Dist. No. 8, 76 Wis. 177, 44 N .W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41; *People v. Board of Education,* 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220.

But the question here for determination is as to whether the board of regents of the Agricultural and Mechanical College have authority to levy a fee on every proposed student as a condition precedent to entrance therein, to be used for the maintenance of the Young Men's and the Young Women's Christion Associations. Said section 5 of article 2 is self-executing, and requires no act of the Legislature to become operative, but by itself controls all legislation upon the subject of appropriating money or other property for such purposes. *Synod v. State,* 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418. Obviously it would not be permissible for said board to use any funds appropriated by the state for the purpose of maintaining these associations, teaching and promulgating a system of religion. If the Legislature is powerless to appropriate a fund for the purpose of maintaining such associations, or to authorize said board to use said funds for such purposes, it follows that it is not within its power to authorize said board to require a fee to be paid by the student as a condition precedent to entrance, to be used by said board for said purposes. For other authorities on this subject, see citations under sections 3 and 13 of Williams' Ann. Const. of Okla.

It is within the power of said board to provide not only for athletics to be taught, but also for an athletic association of the students in said institution. It is also within the power of said board to provide for a college magazine. But to say that it was reasonably within the implied powers of said board, as a condition precedent to entrance, to require a deposit to be made for the maintenance of said athletic association and magazine would be equivalent to saying that it was within the power of said board to require a deposit by each student for the payment of all books and appliances necessary to be used by such students in said institution as a condition precedent to entrance.

If there is no appropriated fund available for the replacing of broken vessels or apparatus in the laboratory, or for the sup-

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port of the gymnasium or the athletic association, or for the publication of the college magazine, or for the repair of the musical instruments and the typewriting machines, then, as to such students in their course of study and training that use the laboratory or the gymnasium or the magazine, or participate in the athletic association, within their college course, a reasonable incidental fee may be required after admission. All citizens of this state between the ages of twelve and thirty years are entitled to be admitted to instruction in this institution. The board of regents are permitted to prescribe only such rules relative to admission when not prohibited, expressly or impliedly, by law, as may be necessary and convenient to carry out the purposes of the institution. To require a reasonable deposit to reimburse the institution for breakage and injury negligently done by the students in the institution, such deposit to be refunded if no injury is done by the student, is reasonable and necessary and conducive to carrying out the purposes of the institution. To require the supplying of the required uniform as a condition precedent to entrance comes also within the same rule; but, if the proposed student has supplied himself with such uniform, then there is no necessity for a deposit for such purpose. The other matters arise after the entrance of the student, and come within the powers of the regulation of the institution after such entrance.

The order, as modified to conform to this opinion, will be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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JONES v. EAST.

No. 2127. Opinion Filed October 15, 1912.

(127 Pac. 261.)

APPEAL AND ERROR—Review—Abstract Questions. The Supreme Court will not decide abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical result can follow.

(Syllabus by the Court.)

Error from District Court, Kiowa County; James R. Tolbert, Judge.

Action by Lillian Jones against Will East. Judgment for defendant, and plaintiff brings error. Dismissed.

L. M. Keys, for plaintiff in error.

Richard A. Billups, for defendant in error.

DUNN, J. This case presents error from the district court of Kiowa county. October 15, 1910, plaintiff in error, as plaintiff, filed in the district court of Kiowa county her petition, duly verified, and caused summons to issue from said court as provided by law. The said petition prayed a temporary injunction against the defendant in error, as defendant, enjoining him from entering upon or attempting to enter certain land described therein. It appears that plaintiff's grantor and defendant had entered into negotiations looking to the leasing of said land; the question of the consummation thereof being the one mooted on the trial. The trial judge granted a temporary injunction, restraining the defendant from going upon the land. On notice, the same was dissolved, to reverse which proceedings in error have been brought.

The lease, if made, was for the use of the land involved for the year 1911, which has now long since passed; hence it is manifest that any order which we might now make in the case could not in any wise affect the substantial merits of the controversy,

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and it is seldom that a court will determine a case simply for the purpose of determining the costs. The question presented by the briefs of counsel, due to the foregoing facts, are now abstract or hypothetical, and entirely disconnected from the granting of any actual relief, or from the determination of which any practical relief could follow. Under these circumstances, this court has uniformly declined to consider such cases on their merits. *Chicago, R. I. & P. Ry. Co. v. Territory,* 21 Okla. 334, 97 Pac. 267; *Miller et al. v. Ury,* 23 Okla. 546, 102 Pac. 112; *Hodges v. Schafer,* 23 Okla. 404, 100 Pac. 537; *Moore v. Wilson et al., post,* 127 Pac. 260.

The cause is accordingly dismissed.

KANE and HAYES, JJ., concur; TURNER, C. J., and WILLIAMS, J., absent.

LANGSTON v. THIGPEN.

No. 3092. Opinion Filed October 15, 1912.

(127 Pac. 258.)

APPEAL AND ERROR—Final Judgment. Where, pursuant to sections 6094, 6095, Comp. Laws 1909 (sections 4760, 4761, Wilson's Rev. & Ann. St. 1903), an order is made to set aside a judgment of the district court, said order is not final, and error therefrom will not lie.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; Wade S. Stanfield, Judge.

Action by Joseph H. Thigpen against S. G. Langston to vacate and set aside a former decree rendered in favor of defendant. Judgment for plaintiff, and defendant brings error. Dismissed.

Matthews & Ellison, for plaintiff in error.

W. W. Wood, J. E. Wyand, and *Chas. A. Moon,* for defendant in error.

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DUNN, J. This case presents error from the district court of Okmulgee county. In May, 1908, S. G. Langston commenced his action against J. H. Thigpen and J. E. Long, by filing his petition in the above-named court, in which he asked for certain relief. Thereafter, and on the 4th day of December, 1909, in the absence of the defendants, and without appearance for them, or either of them, the cause was tried to a jury, which returned its verdict in favor of plaintiff for $1,250. Thereafter, and on the 29th day of November, 1910, the said Thigpen began his action under the provisions of section 6094, 6095, Comp. Laws 1909 (sections 4760, 4761, Wilson's Rev. & Ann. St. 1903), for the purpose of securing an order from the district court vacating the judgment in the said cause on the grounds therein set forth. On the pleadings filed and the evidence taken therein, the district court, on the 31st day of March, 1911, entered its order adjudging and decreeing that the judgment theretofore rendered on the 4th day of December, 1909, be vacated, set aside, and a new trial granted. Thereafter counsel for defendant filed a motion for a new trial, which the court, after having considered, overruled, and the cause has been filed in this court on petition in error and case-made for the purpose of securing a review of the said order.

Counsel for defendant in error have filed their motion to dismiss the proceeding in error, for the reason, *inter alia,* that the order appealed from is not a final or appealable order, from which appeal lies to this court. This motion, on the authority of *Smith v. Whitlow et al.,* 31 Okla. 758, 123 Pac. 1061, and the cases cited therein, must be sustained, it being there held that, where an order is thus made to set aside a judgment of the district court, the same is not final, and error therefrom will not lie.

The cause is accordingly dismissed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur; HAYES, J., absent, and not participating.

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McCONNELL v. CORY.

No. 3167. Opinion Filed October 15, 1912.

(127 Pac. 759.)

1. **APPEAL AND ERROR—Petition in Error—Amendment.** Within the time allowed for bringing proceedings in error in this court, amendments to a petition in error are generally allowed as of course; thereafter, matters of form as a rule may be corrected, but no new allegations of error can be made.

2. **SAME—Review—Amendment—Motion for New Trial.** Where the statutory period within which a proceeding in error may be begun has elapsed, and the only errors sought to be presented by the petition in error are those alleged to have occurred on the trial, and no assignment is made that the trial court erred in its action on the motion for a new trial, this court is without jurisdiction or authority to review the case, or to allow an amendment of the petition in error setting up such assignment.

(Syllabus by the Court.)

Error from District Court, Tulsa County; L. M. Poe, Judge.

Action by L. L. Cory against P. D. McConnell. Judgment for plaintiff, and defendant brings error. Dismissed.

Rowland & Talbott, for plaintiff in error.

Hindman & Woodford, for defendant in error.

DUNN, J. This case presents error from the district court of Tulsa county. May 10, 1911, the said court denied the motion of plaintiff in error for new trial and rendered judgment. October 12, 1911, a petition in error with case-made attached was filed in this court. June 6, 1912, a motion to dismiss the appeal was filed by counsel for defendant in error on the ground that no question is presented in the petition in error, except of errors alleged to have occurred during the progress of the trial of the cause, and no assignment is made that the court erred in overruling the motion of plaintiff in error for a new trial.

Counsel for plaintiff in error very frankly concede that under the authorities both of Oklahoma and also of Kansas, from

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whence our procedure act came, it is essential, in order to secure a review of errors alleged to have occurred during the progress of the cause in the trial court, that a motion for a new trial be presented in the court where they are alleged to have occurred, and that the action of the court thereon be presented to this court as one of the assignments of error. But it is urged that counsel for defendant in error ought not now be permitted to object, by reason of the absence of such assignment in the petition in error, because of delay in presenting it, and for the further reason that the same was assigned as error in the briefs filed. In addition thereto, counsel pray for permission to correct their petition in error, so as to include among its assignments the assignment that the court erred in denying the motion for new trial. While it must be conceded, as stated by counsel, that the trend of modern decisions is toward a liberal construction of the right of amendment, where no substantial injury will ensue and justice be promoted, the proposition presented in this case is rather more than a right to amend. It is a request to be permitted at this time to state a cause of action.

The statute in force at the time of the rendition of the order of which complaint is sought to be made provides that "no proceeding for reversing, vacating or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of." Section 6082, Comp. Laws 1909. The real gist of the complaint sought to be made in this court is that the trial court erred in not granting to plaintiff in error another trial. If the motion had been granted, plaintiff in error's cause of action in this court would not have existed. It was the denial of the request contained in this motion which constitutes his grievance, and, in order to state a cause of action on errors occurring on the trial, it was essential within one year, under the statute above cited, to begin his action in this court. In the absence of complaint of the action of the trial court in denying the motion for new trial, no cause of action is stated, and to allow such cause to be now stated would not be to grant an amendment, but would be virtually to enlarge the time given in the statute, and

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to assume a jurisdiction which has been denied, and no laches of either the defendant in error or his counsel could confer such jurisdiction. It is the duty of this court to discover its jurisdiction, and, where it is lacking, decline to exercise it. See *Haynes et al. v. Smith*, 29 Okla. 703, 119 Pac. 246, in which the questions presented by counsel for plaintiff in error are decided adversely to them.

This court, therefore, being without jurisdiction to review the errors which are alleged to have occurred, and no question being made as to the sufficiency of the pleadings to sustain the judgment, the motion to dismiss must be sustained.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

STINE v. LEWIS, *Sheriff, et al.*

No. 3186. Opinion Filed October 15, 1912.

(127 Pac. 396.)

1. **ANIMALS—Quarantine—Infectious Diseases—Notice.** That portion of section 7, art. 1, c. 3, p. 6, Sess. Laws 1907-08, providing that, after the Board of Agriculture had determined the quarantine lines, the president thereof should at once issue a proclamation setting forth the boundary and location thereof, and "have such proclamation printed and posted on each public road where same may cross such line, and at the courthouse in each county through which such line passes, and no further notice or publication shall be necessary," was repealed by section 218, Comp. Laws 1909, which provided that the said board should "at the earliest practicable date publish once in no less than three newspapers of general circulation within the state, a notice of said proclamation and such publication shall be deemed full and sufficient legal notice of the proclamation of said board."

2. **APPEAL AND ERROR—Review—Findings of Trial Court.** Where an officer charged with the duty of selecting three newspapers of general circulation for the purpose of an official publication has acted, his selection will be presumed to be valid and the papers to fulfill the requirements of the statute, and where their sufficiency is questioned and a finding of the trial court supports the action of such officer, and the evidence seems reasonably to sustain the finding of such court, the same will not be disturbed on appeal.

3. **CONSTITUTIONAL LAW—Constitutionality of Act.** The constitutionality of the criminal provisions of section 222, Comp.

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Laws 1909, cannot be raised by a party who is not being proceeded against thereunder, but against whom action is taken by officers merely under those portions of the act compelling him to dip his cattle as provided for therein, or subjecting him to the cost and expenses of dipping the same where he refuses, and the service is rendered by the officers.

4. **ANIMALS—Infectious Diseases—Constitutional Law.** Section 223, Comp. Laws 1909, is not unconstitutional for the reason either that the officers are authorized to act on the belief of the inspector of the Board of Agriculture or because authorized, on the refusal or failure to dip or otherwise treat cattle by one owning or caring for the same on premises believed to be infected, to take the cattle into custody and dip and treat the same, or for the reason that the costs and expenses are assessed to the owner and no preliminary notice and hearing is provided for before the same are made and the cattle held to cover them, as the owner has sufficient notice before the sale to give him opportunity to secure a hearing.

(Syllabus by the Court.)

Error from District Court, Grady County;
Frank M. Bailey, Judge.

Action by J. H. Stine against John C. Lewis, sheriff, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Bond & Melton, for plaintiff in error.

Chesley C. Herndon, for defendants in error.

DUNN, J. This case presents error from the district court of Grady county. The plaintiff in error as plaintiff below began his action against the defendants, who are about to proceed to take action under the quarantine laws of the state with the intent of dipping plaintiff's cattle to eradicate the Texas cattle ticks with which they were believed by them to be infected. The court denied the relief demanded, and plaintiff, after denial of motion for new trial, lodged the cause in this court for review.

Several assignments of error are argued: First, it is contended that the quarantine line described in the proclamation of July 1, 1911, was not proclaimed or established as required by law, in that no notice of the establishment thereof was posted where the public roads cross the same and at the courthouse in Grady county, as provided for by the

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Laws of 1907-08, nor was such proclamation published in three newspapers of general circulation within the state of Oklahoma, as provided for by an act of the Legislature of 1909. The foregoing contention naturally divides itself into two parts, due to the statutes out of which it arises.

The First Legislature of the state of Oklahoma in an act which provided generally for the organization of the Board of Agriculture, prescribing the manner of selecting the president and other members thereof, defining their duties, and fixing their compensation, provided as one of the duties of the said board in section 6 thereof (article 1 of chapter 3, p. 6, Sess. Laws 1907-08) that the said board should establish quarantine lines to protect the live stock of the state from contagious and infectious diseases. Under section 7 thereof it was provided that, after the said board had determined the quarantine lines, the president thereof should at once issue a proclamation setting forth the boundary and location thereof, and "have such proclamation printed and posted on each public road where said road may cross such line, and at the courthouse in each county through which such line passes, and no further notice or publication shall be necessary." It is conceded on the part of counsel for defendants and so found by the court that this provision of the statute was not complied with, it being contended that this was not necessary because the act of the Legislature of March 20, 1909 (section 218, Comp. Laws 1909), provided:

"That when the State Board of Agriculture shall have determined quarantine lines and made rules and regulations to maintain and enforce the same to prevent the communicating or conveying of contagious or infectious diseases of live stock within this state, as provided by law, the president of said board shall at once issue his proclamation setting forth and proclaiming the boundary and location of said quarantine line or lines, the orders, rules and regulations, so prescribed by said board, and the said president of said board shall at the earliest practicable date publish once in no less than three newspapers of general circulation within the state, a notice of said proclamation and such publication shall be deemed full and sufficient legal notice of the proclamation of said board."

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It is the contention of counsel for defendant that the act last above quoted superseded the act relied upon by counsel for plaintiff. The section relied upon by counsel for plaintiff was contained in a general act relating, as is seen above, to the duties of the Board of Agriculture, while the section of the act last above quoted is in a special act, subsequently passed, relating to this specific subject here under consideration, and the general rule is that in such cases the provisions of a subsequent special act will control over language contained in a prior general act. The publication of the proclamation was to be deemed full and sufficient legal notice thereof is the language used, and it was not the intention of the Legislature that, in addition thereto in order that the publication might be legal and valid, the provisions of the prior act of 1907-08 should be complied with. Under these circumstances, this contention on the part of counsel for plaintiff cannot be sustained.

This leaves for consideration the question of whether the newspapers in which the proclamation was published were of general circulation within the state, for, as is seen, the act provides that the said president shall publish the proclamation "in no less than three newspapers of general circulation within the state." Counsel for plaintiff contend that the circulation of the papers in which the proclamation was published did not fill the requirements of this statute, in that it was not general. The finding of the court on this proposition was as follows:

"It is further admitted, and the court so finds, that the said proclamation by the duly qualified and acting president of the said Board of Agriculture of the state of Oklahoma was published in three newspapers in the said state of Oklahoma, to wit, the New State Tribune, the Chickasha Daily Express, and the Vinita Leader. It is admitted, and the court so finds, that said publications are newspapers within the meaning of the law. It is further admitted, and the court so finds, that the said New State Tribune is a newspaper of general circulation within the state of Oklahoma. The court further finds that the said Chickasha Daily Express is a newspaper published in the city of Chickasha, Grady county, Okla.; that at the time of the publication of said proclamation said Chickasha Daily Express had 1,660 *bona fide* subscribers; that of said subscribers 1,100 were within the city of Chickasha, 300 in that part of Grady county outside

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of the city of Chickasha, and 60 subscribers in the United States outside of the state of Oklahoma, and 200 subscribers in the state of Oklahoma, outside of the city of Chickasha and Grady county. The court further finds that said Chickasha Daily Express had *bona fide* subscribers in the counties of Stephens, Garvin, McClain, Canadian, Oklahoma, Caddo, Comanche, Garfield, Tulsa, and perhaps others; but the court further finds that there were numerous counties within the state of Oklahoma in which said Chickasha Daily Express at the time of the publication of such proclamation had no subscribers. The court further finds that the Vinita Leader is a newspaper published in the city of Vinita, in Craig county, Okla.; that at the time of the publication of the said proclamation of the said State Board of Agriculture said paper had 2,500 *bona fide* subscribers; that of said subscribers 2,000 were located within the county of Craig and the city of Vinita, about 150 subscribers in the United States outside of the state of Oklahoma, and 350 subscribers in the state of Oklahoma outside of the city of Vinita and Craig county, such subscribers being principally within the counties in which the larger towns and cities of the state of Oklahoma are located. The court further finds that there were counties in the state of Oklahoma in which the said Vinita Leader had no circulation. The court is unable to, and does not, find as to what number of counties in the state of Oklahoma in which the said Vinita Leader had no subscribers. It is agreed, and the court so finds, that the said Chickasha Express and Vinita Leader and New State Tribune and each of them circulate generally among all classes, trades, and professions."

And as a matter of law the court found as follows:

"The court further finds that the Chickasha Daily Express and the Vinita Leader and the New State Tribune are three newspapers of general circulation within the state of Oklahoma."

The act makes it the duty of the president of the Board of Agriculture to make publication of the proclamation. This places upon him the duty of selecting the three newspapers in which it should be published. It will be noted that he selected the Chickasha Daily Express, the Vinita Leader, and the New State Tribune, each of which the court finds circulates generally among all classes, trades, and professions. While it is true it is not shown that any one of these papers circulates in every county in the state of Oklahoma, this in our judgment is not conclusive against them being deemed newspapers of general circulation, for

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we do not conceive it necessary that, in order that a paper be one of general circulation in the state, it is essential for it to have a circulation in every county in the state. If this requirement were made, we doubt much whether any paper could be found within the state which would meet it, and certainly there would not be three such papers.

It seems to us that the true rule in such a case as this is that where an officer is charged with the duty of selecting a newspaper or newspapers of general circulation for the purpose of publication, and he has acted, and it is not shown that he acted in bad faith or that the circulation of the paper or papers was of such a character as to raise a presumption of bad faith, the papers selected by him will be held *prima facie* to fill the requirements of the statute, and where their sufficiency is questioned, and the finding of the trial court supports the action of the officer, and where on appeal the evidence appears to reasonably sustain the finding of the trial court, the same will not be disturbed.

The next contention of counsel for plaintiff arises out of the action taken by defendants under the following sections of the act of March 20, 1909. It is provided in sections 222 and 223, Comp. Laws 1909, as follows:

"Section 222. It shall be the duty of any person in any county situated above the quarantine line fixed by the State Board of Agriculture, owning or caring for live stock on premises believed by the live stock inspector of the Board of Agriculture to be infected with ticks (*morgaropus annulatus*) to treat such live stock at such times and in such manner as shall be directed by the said live stock inspector, and failure on the part of such owner or caretaker to so treat such live stock as directed by said live stock inspector shall be deemed a misdemeanor and upon conviction of same said party shall be fined in the sum of not less than twenty-five dollars ($25) and not more than five hundred dollars ($500) and costs, or by imprisonment in the county jail for not less than ten (10) days and not more than thirty (30) days or by both such fine and imprisonment.

"Sec. 223. When any person in any county situated above the state quarantine line fixed by the State Board of Agriculture, fails or refuses to dip or otherwise properly treat his live stock, at such time, and in such manner as directed by the State Board

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of Agriculture, or an inspector acting under authority of same, such inspector shall have power to call upon the sheriff of the county in which such cattle are found, whose duty it shall be together with the inspector in charge to dip or treat such live stock in a manner and at such times as said inspector directs and shall keep said cattle in his custody, subject to such quarantine restrictions as he shall receive from the said live stock inspector. No officer who shall seize live stock for such treatment or dipping shall be liable to the owner or owners of such live stock for damages by reason of such taking, or by reason of such dipping or treatment, Provided, that such dipping or treatment has been done in accordance with the direction of the inspector in charge. Before such live stock shall be delivered to owner there shall be paid to the sheriff having such live stock in his custody all costs and expense of taking, detaining, holding and disinfecting, and in case such costs are not paid, said officer shall advertise in a manner as provided by law, in case of taking, caring for and the sale of personal property upon execution, and he may sell such live stock or such portions thereof as may be necessary to pay his costs and expenses of sale, and he shall forthwith pay over to the owner or owners any amount so received in excess of the legal fees and expenses of such officers."

It is the contention of counsel for plaintiff that the foregoing act authorizing the inspector to seize, dip, or treat cattle on premises believed by the live stock inspector to be infected with ticks, and authorizing the sheriff to hold such cattle, advertise and sell the same for the payment of all cost and expense, and without notice to the owner, or opportunity to be heard as to whether or not his premises or property may be infected, and exempting such officers from liability for damages, is in violation of section 7 of article 2 of the Constitution of the state of Oklahoma (section 15, Williams' Ann. Const. of Okla.), and in violation of the fourteenth amendment of the Constitution of the United States.

It is first contended that the act is unconstitutional and void because it provides that the person owning or caring for stock believed by the live stock inspector to be infected with ticks who fails to treat the same in such manner as directed by the live stock inspector may be subjected to a fine of not less than $25, and not more than $500 and costs, or by imprisonment in the county jail for not less than ten days and not more than 30 days, or by both such fine and imprisonment, it being urged that

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it is not the duty of the person to treat cattle which may be infected with the ticks or kept on premises which may be infected, but the act requires the treatment of cattle or premises *believed* by the live stock inspector to be infected. In view of the fact, however, that plaintiff is not being proceeded against under the criminal provisions of this act, it is not necessary for us to notice this objection; for, if this particular section of the act were unconstitutional, it is in no wise involved in the proceeding taken in the present case, and the rule as stated by Judge Cooley in his work on Constitutional Limitations (6th Ed.) 196, is that "a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." See *City of Kansas City et al. v. Union Pacific Ry. Co. et al.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321; *Dejarnett v. Haynes*, 23 Miss. 600; *Sullivan, etc., v. Berry's Adm'r*, 83 Ky. 198, 4 Am. St. Rep. 147; *Hagar v. Reclamation Dist No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. It will be time enough to determine the constitutionality of this particular section of the act in this respect when some one is proceeded against charged with the violation thereof. In the present case, should we investigate the questions presented, and finally determine that the section referred to must fall on this account, it would determine no question arising under the facts here presented, for the reason that the sole thing sought to be done in this case is the taking into possession of the defendants, for treatment, the stock of plaintiff on premises believed by the inspector to be infected with ticks, as provided for in section 223, *supra*.

The sole proposition involved in this controversy is one of the constitutional right of this administrative board to exercise the authority sought to be vested in it by this legislative act. The exercise of the power here sought to be conferred is no more nor less than the state acting through a duly constituted agency compelling parties owning or in the possession of property found or believed to be dangerous to the property of others to so treat it as to relieve the danger. It is calling into action the golden rule established by law for the holding and use of property and the enforcement of the doctrine that each must so hold and man-

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age his property that it will not injure others. It is manifest that the ascertainment of the conditions under which the remedy will be applied must often be left to some executive or administrative officer or board, and it is equally manifest, if it shall be efficacious, that the proceeding taken, especially where disease is involved, be in a measure summary. If the law provided as contended by counsel for plaintiff it must provide in order to be valid, that the owner is constitutionally entitled to be called into court and to have a trial of the question of whether or not his cattle or premises are infected, long prior to the determination of the action, the damage sought to be prevented would have been accomplished, and the law would often fail in its purpose by the very provisions made for carrying it out. So that the only result which would follow its administration would be the burden and expense of litigation. On the subject of the power of such boards, Mr. McGehee in his work on Due Process of Law, p. 366, says:

"The subject-matter may be such that only a general scheme of policy can with advantage be laid down by the Legislature, and the working out in detail of the policy indicated may be left to the discretion of administrative or executive officials. Sometimes the discretionary duties so intrusted to administrative officials are under the terms of the statute to be performed without granting a hearing to those whose interests are affected. In such cases attacks have been made on the laws as unconstitutional delegations of power to the executive. Where the statute has indicated with all practical definiteness a general scheme of policy and a standard to be followed, leaving for the executive only details which it could not in the nature of things decide, such legislation has uniformly been upheld by the federal Supreme Court."

The case of *Balch v. Glenn et al.*, 85 Kan. 735, 119 Pac. 67, presents in nearly all of its phases the identical questions raised by counsel in the case at bar. The court had before it a statute of that state creating the entomological commission which provided for the extermination of the San Jose scale and other orchard pests. It was assailed on the ground that it delegated to the commission the power to declare the existence of conditions which called into operation its provisions. In answering the con-

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tention made, the court in a very learned and exhaustive opinion by Justice Porter said:

"The statute is not invalid because it delegates to the commission the power to declare the existence of conditions which call into operation the provisions of the statute. The Legislature of the state may declare that to be a nuisance which is detrimental to the health, morals, peace, or welfare of its citizens, and may confer power upon local boards or tribunals to exercise the police power of the state when in the judgment of such tribunals the conditions exist which the Legislature has declared constitute such nuisance. Similar power has been conferred upon cities of the first class to remove certain nuisances, and to tax the costs of the proceedings upon the property where the nuisances are located. Laws 1905, c. 109, sec. 1; Gen. St. 1909, sec. 918. Like authority is conferred upon the live stock sanitary commissioner to determine that domestic cattle or live stock are infested with certain contagious diseases. Laws 1905, c. 495, sec. 5; Gen. St. 1909, sec. 9136. 'The Legislature of the state may declare that a nuisance which is such in fact, and may create a commission with power to determine whether the conditions defined by the act exist.' Cooley, Const. Limitations (7th Ed.) 882, note 1. In determining whether the conditions exist which the Legislature declares constitute a nuisance—that is, whether a particular orchard or some portion thereof, is so infested with insect pests as to require treatment or extermination—the commission exercises some discretion which is in a limited sense judicial, but no more so than the discretion generally exercised in the enforcement of police regulations. It is like the discretion exercised by inspectors of health, food, grain, milk, live stock, by the various state boards and commissions, and by city officers charged with the enforcement of police regulations, which, in order to be effective, often require prompt and summary execution, and which from their nature call for the exercise of more or less discretion in the officers whose duty it is to make them effective. The same objection was urged against the act creating the board of railroad commissioners and acts supplementary thereto. It was held that, although the board is required to exercise judgment and discretion, and to make orders for the regulation and control of railroads and other common carriers, the act does not confer upon the board either executive or judicial powers. *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606. To the same effect is *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80 [37 L. R. A. (N. S.) 598], where it was held that the granting or refusing of an application for a bank charter by the charter board calls for the exer-

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cise of discretion, and that the act creating the board is not invalid because it provides that the board shall refuse a bank charter if upon examination it shall determine against the public necessity of the business in the community in which it is sought to establish such bank. The statutes construed in both of the foregoing cases were passed by the Legislature under the police power of the state. The precise question was before the Supreme Court of California in *County of Los Angeles v. Spencer,* 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217, where a statute almost identical with this was construed, and it was held that: 'A statute designed to protect and promote the horticultural interests of the state, which declares that all places, orchards, etc., infected with the pests mentioned in the statute are public nuisances, and which act is a proper exercise of the police power, is not unconstitutional on the ground that it confers judicial powers upon the horticultural commissioners, where a commissioner, in determining whether any particular place is a nuisance, must necessarily exercise some discretion which, in a strict sense, is judicial in its nature.'"

The contention is also made that the act is unconstitutional because the evidence showed that, in order to dip the cattle as directed by the inspector, they must be gathered, driven to the dipping vat, placed in the pens, and that the damage to the cattle will be about $1.50 per head in addition to the expense incurred. The act in question makes the owner of the cattle liable for this burden of cost and expense, and it is contended it is unconstitutional for the reason that there is no provision made fixing the cost and expense or fees, and no court or tribunal determines the amount thereof, and that plaintiff is given no notice prior to the same becoming a fixed charge upon his cattle, which the statute authorizes the officers to hold and sell to the extent that may be necessary to pay the same. A complete answer to counsel's chief objection is that summary proceedings, such in kind as are authorized by this statute, and the burdening of the property with the cost thereof, have been upheld by the Supreme Court of the United States as well as the highest courts of many of the states. For instance, it is said in McGehee on Due Process of Law, p. 339, with authorities cited to support it, that:

"Quarantine regulations being adopted for the protection of the public against the spread of disease, the requirement that the

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vessel examined shall pay for the examination is a part of all systems of quarantine (*Morgan's Steamship Co. v. Louisiana Board of Health,* 118 U. S. 466, [6 Sup. Ct. 1114, 30 L. Ed. 237]), and householders in a city may be required to bear the expense of the transportation of garbage to the place provided for its cremation (*California Reduction Co. v. Sanitary Reduction Works,* 199 U. S. 306 [26 Sup. Ct. 100, 50 L. Ed. 204]). The expense of a compulsory examination of railroad engineers to ascertain whether they are free from color blindness has been held to be properly chargeable against the railroad companies (*Nashville, etc., R. Co. v. Alabama,* 128 U. S. 96 [9 Sup. Ct. 28, 32 L. Ed. 352]). So the expenses of a railroad commission may be charged against the railroad corporations (*Charlotte, etc., R. Co. v. Gibbes,* 142 U. S. 386 [12 Sup. Ct. 255, 35 L. Ed. 1051]); *New York v. Squire,* 145 U. S. 175 [12 Sup. Ct. 880, 36 L. Ed. 666]), of mining inspectors, against the owners of mines (*Consolidated Coal Co. v. Illinois,* 185 U. S. 203, 207 [22 Sup. Ct. 616, 46 L. Ed. 872]), of sanitary improvements, against the owners of the tenement houses in which the improvements are required (*Health Dept. v. Trinity Church,* 145 N. Y. 32 [39 N. E. 833, 27 L. R. A. 710, 45 Am. St. Rep. 579]), of constructing and maintaining such safeguards as are required to protect the public safety in connection with the operation of railroads against the railroad companies (*New York, etc., R. Co. v. Bristol,* 151 U. S. 556 [14 Sup. Ct. 437, 38 L. Ed. 269]; *Chicago, etc., R. Co. v. Nebraska,* 170 U. S. 57 [18 Sup. Ct. 513, 42 L. Ed. 948])."

In short, the owner of the property which offends must bear the burden of removing the offense, and not the public. This would seem to be a just rule.

On the question of notice before the expense becomes a fixed charge against his property, it is to be first observed that the owner in the first instance is to be given an opportunity to dip his cattle or disinfect his property himself, thereby being enabled to keep the expense which he must pay within such limits as he chooses or as the necessities of the case may compel. It is only when he fails or refuses that the board is authorized to take control of his property and to make the expense for which he is held liable. If he elects, on being notified of the amount, he may pay the same and his property will be turned back to him. If he chooses to refuse to pay, then so much of his property is

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held as is necessary to pay the costs and expenses of the proceeding and the expenses of the sale; any balance being returned to the owner. Hereunder in our judgment is the only notice, if any is required to be given to the owner, to fulfill the demands of due process of law. The same question was presented in the case of *Balch v. Glenn et al., supra.* In that case the court dealing therewith said:

"It is urged that the act is unconstitutional because it authorizes the cost of the proceeding to be charged against the property of the owner without notice to him or opportunity to question the amount thereof. The act, however, requires notice in writing to be served upon the owner, stating the amount of expense incurred by the commission and notifying him that unless the same be paid within twenty days the same will be taxed against his property. He therefore has notice before any lien is created upon his property, and before it can be taken or sold. Having this notice, he is relegated to his common-law remedies. If he believes the amount charged is greater than it should be, he has ample time to determine what is the proper charge, tender the same to the county clerk, and enjoin in any court of competent jurisdiction the collection of a greater amount. It has been held by the Supreme Court of the United States that the phrase 'due process of law' does not necessarily mean a judicial proceeding. *McMillen v. Anderson,* 95 U. S. 37, 41 [24 L. Ed. 335]. On the other hand, it does not necessarily mean a special tribunal created for the express purpose of hearing the merits of the particular controversy. Where ample notice is provided which gives to the property owner an opportunity to have a hearing in any court of competent jurisdiction before his property is affected, he is afforded due process of law."

So, in the case at bar, if the plaintiff believes the amount of the expenses and costs which he is required to pay are greater than that actually and in good faith incurred, he has notice thereof before any lien may be enforced against his property and before it can be sold. Having this notice, he may be protected against the same by a proper proceeding in a court having jurisdiction thereof.

In the examination of the questions here presented, we have examined many authorities of which no note is taken above, and have also carefully read the evidence, which, although not set

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out, in our judgment amply supports the conclusions reached by the trial court.

Finding no error in the record, the judgment of the trial court is therefore affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

DENNY v. OSTRANDER.

No. 3823. Opinion Filed October 15, 1912.

(127 Pac. 390.)

APPEAL AND ERROR—Defect of Parties—Dismissal. Where, in an action for a broker's commission against two defendants, judgment is entered against one and in favor of the other, and the former attempts to appeal, his codefendant is a necessary party; and where he is not made a party on appeal the cause will on motion be dismissed.

(Syllabus by the Court.)

Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by P. W. Ostrander against R. A. Denny and L. E. Denny. Judgment for plaintiff against R. A. Denny, and he brings error. Dismissed.

T. G. Cutlip and *Wm. Beatty,* for plaintiff in error.

F. H. Reily, for defendant in error.

DUNN, J. This case presents error from the superior court of Pottawatomie county. It is an action instituted in the said court by P. W. Ostrander against R. A. Denny and L. E. Denny to recover a broker's commission, which, it is alleged, defendants agreed to pay to the plaintiff to sell or exchange for them a certain stock of goods. On a trial had, the following judgment was entered:

"It is therefore ordered and decreed by the court that the plaintiff, P. W. Ostrander, do have and recover of and from

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R. A. Denny the sum of $391.28, with interest thereon at the rate of six per cent. per annum from this date, and all costs of this suit, taxed at $16.30; and it is further ordered that the said plaintiff take nothing as against the defendant L. E. Denny, and that he be in all things discharged, with his costs."

From this judgment the defendant R. A. Denny has sought to lodge an appeal in this court without making his codefendant, L. E. Denny, a party, either plaintiff or defendant in error. Counsel for plaintiff, on July 16, 1912, filed a motion to dismiss the cause for the reason that L. E. Denny was a necessary party to the appeal.

Under the uniform holding of this court, the appeal must be dismissed. In the case of *Ft. Smith & Western R. Co. v. Wilson, ante,* 124 Pac. 948, judgment was entered in the trial court as follows:

"It is ordered, adjudged, and decreed that the plaintiff have and recover of the defendant the Ft. Smith & Western Railroad Company the sum of $500, and his costs of this action duly expended, and that the defendant St. Louis & San Francisco Railroad Company have and recover of the plaintiff its costs in this action duly expended, and let execution issue accordingly."

From this judgment the Ft. Smith & Western Railroad Company sought to appeal without making the St. Louis & San Francisco Railroad Company a party, and this court, in the consideration thereof, said:

"In the case at bar the plaintiff asserted a joint cause of action against both railroad companies as connecting carriers. The jury found that the damage was due to the negligence of the Ft. Smith & Western Railroad Company, and not that of the St. Louis & San Francisco Railroad Company; and it is argued by counsel for defendant in error that if the judgment should be reversed it might be that upon a second trial the jury would believe that the negligence which caused the damages was imputable to the St. Louis & San Francisco Railroad Company, and not to the Ft. Smith & Western Railroad Company, and in that event the plaintiff would be confronted by a final judgment in favor of the St. Louis & San Francisco Railroad Company, and therefore be unable to pursue it. It is urged that if the cause is reversed plaintiff should have the right to proceed, as he did in the first instance, against both carriers, and again let the jury determine whose negligence caused the injury. Under

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the uniform holding of this court, following the reasoning in the case of *Humphrey et al. v. Hunt,* 9 Okla. 196 [59 Pac. 971], the motion to dismiss must be sustained."

So it is in this case. If the judgment should be reversed, it might be that upon a second trial the court would believe that L. E. Denny was severally or jointly liable to plaintiff, in which event he would be confronted with a final judgment in his favor against L. E. Denny, and be unable to pursue him. See, also, *Am. Nat. Bank of McAlester et al. v. Mergenthaler Linotype Co.,* 31 Okla. 533, 122 Pac. 507; *K. C., M. & O. Ry. Co. v. Williams, ante,* 124 Pac. 63, and cases therein cited.

The appeal is accordingly dismissed.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

DUNN *et al.* v. LEWIS.

No. 3904. Opinion Filed October 15, 1912.

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action between Si Dunn and others and H. H. Lewis. From the judgment, Si Dunn and others bring error. Dismissed.

Preston C. West and *Franklin P. Schaffer,* for plaintiffs in error.

Kenneth S. Murchison, for defendant in error.

KANE, J. This cause comes on to be heard upon the motion of the defendant in error to dismiss the appeal of the plaintiffs in error upon the ground, among others, "that the petition in error was filed in this court on the first day of May, 1912, more than 40 days next preceding this motion, and counsel for the plaintiffs in error have neglected, failed and refused to serve on counsel for the defendant in error their brief in support of said petition in error."

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The motion to dismiss is unopposed, and as, up to this time, plaintiffs in error have not asked leave to file brief out of time or otherwise indicated a purpose to further prosecute this appeal, it must be sustained. It is so ordered.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; HAYES, J., absent, and not participating.

SCHOOL DIST. NO. 18, CREEK COUNTY, v. GRIFFITH *et al.*

No. 4022. Opinion Filed October 15, 1912.

(127 Pac. 258.)

APPEAL AND ERROR—Dismissal—Record. A proceeding in error, brought to this court on a case-made, where it does not appear, from the record or otherwise, that the defendant was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error.

(Syllabus by the Court.)

Error from Creek County Court;
Warren H. Brown, Judge.

Action between School District No. 18, Creek County, and William Griffith and L. L. Dougan. From the judgment, the School District brings error. Dismissed.

Oscar Cooper and *F. W. Jacobs,* for plaintiff in error.

McDougal & Lytle, for defendants in error.

DUNN, J. This case presents error from the county court of Creek county. May 29, 1912, there was filed in this court a petition in error with a purported case-made attached. July 26, 1912, counsel for defendants in error filed a motion to dismiss the same for the reason, among others, that neither the defendants in error nor their counsel were present at the settlement of the said case-made by the trial judge, nor was any no-

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tice of the time thereof served on the defendants in error or their counsel, nor was a notice of the time and place of said settlement, or the right to be present at said settlement, waived by the defendants in error or their counsel.

On inspection, the case-made verifies the statements of the motion, and furthermore, that no amendments were offered. It is the settled rule of this court, under numerous authorities, that a proceeding in error, brought on a case-made, where it does not appear, from the record or otherwise, that the defendant in error was present either personally or by counsel at the settlement, or that notice of the time thereof was served or waived, or what amendments suggested, if any, were allowed or disallowed, will be dismissed on motion of defendant in error. *First Nat. Bank of Collinsville v. Daniels,* 26 Okla. 383, 108 Pac. 748; *Ft. Smith & W. R. Co. v. State Nat. Bank of Shawnee,* 25 Okla. 128, 105 Pac. 647; *Richardson v. Thompson, ante,* 124 Pac. 64.

The appeal is accordingly dismissed.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

MOORE v. WILSON, *President of State Board of Education, et al.*

No. 4040. Opinion Filed October 15, 1912.

(127 Pac. 260.)

Error from District Court, Grady County; J. J. Carney, Assigned Judge.

Action by J. Alexander Moore against R. H. Wilson, as President of the Board of Education of the State of Oklahoma, and others. From an order dissolving a temporary injunction, plaintiff brings error. Dismissed.

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A. J. Morris and *F. E. Riddle,* for plaintiff in error.

Chas. West, Atty. Gen., and *R. E. Gish,* Asst. Atty. Gen., for defendants in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss, upon the following grounds:

"1. That plaintiff in error has not complied with rule 7 of this court, in that petition in error was filed June 4, 1912, and no brief on behalf of appellant has been filed to this date. No request for additional time is requested by counsel nor allowed by the court.

"2. That said appeal was taken from an order of the district court, made after hearing, dissolving a temporary injunction theretofore granted on an *ex parte* application. That the principal relief asked by plaintiff was an injunction against the defendants interfering with him as president of the Industrial School for Girls at Chickasha during the term of his office, which was alleged to be one year from July 1, 1911, to July 1, 1912. That after dissolving said temporary injunction, or sustaining a motion of defendants to that effect, said district court suspended and superseded said order pending and conditioned upon the plaintiff perfecting an appeal to the Supreme Court within 30 days. That by virtue of said supersedeas, plaintiff in error remained in possession of said office during the whole of his term. That his said term of office is now ended, another president has been elected, qualified, and entered upon the duties of said office for the school year beginning September, 1912, and plaintiff in error has and claims no title nor color of title to said office at the present time. That by reason thereof the subject-matter of said appeal and the grounds upon which this court would give relief to plaintiff in error, if at all, have ceased to exist and the said appeal now presents but a moot question."

Each of the above grounds is sufficient to warrant a dismissal. The motion to dismiss must, therefore, be sustained.

TURNER, C. J., and WILLIAMS and DUNN, JJ., concur; HAYES, J., absent, and not participating.

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LEWIS v. KIDD.

No. 4169. Opinion Filed October 15, 1912.

(126 Pac. 256.)

APPEAL AND ERROR—Time of Taking Appeal. The right of appeal is governed by the law applicable thereto in force when the final judgment or order is rendered, and under chapter 18, p. 35, Sess. Laws 1910-11, proceedings in error in the Supreme Court must be brought within six months from the date of the rendition of the judgment or order from which the appeal is sought to be taken.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; E. D. Oldfield, Judge.

Action between Minerva Lewis and W. W. Kidd. From the judgment, Minerva Lewis brings error. Dismissed.

Wilson & Tomerlin, for plaintiff in error.

J. M. Dodson and *Warren K. Snyder,* for defendant in error.

DUNN, J. This case presents error from the superior court of Oklahoma county. November 22, 1911, the jury in the trial court returned its verdict, and on December 2, 1911, judgment was duly entered thereon. Motion for new trial was duly filed, which on January 2, 1912, was denied. July 9, 1912, plaintiff in error filed her petition in error and case-made in this court, and on July 31, 1912, defendant in error filed a motion to dismiss the appeal, on the ground, among others, that the appeal was not taken within six months from the rendition of the final judgment therein, and that this court is without jurisdiction to hear and determine the same. In answer to said motion, plaintiff in error urges that, although the proceedings were instituted in this court more than six months from the date of the rendition of the final judgment, said cause was commenced in the superior court at a time when the statute permitted appeals to be taken to this court within one year, and that the statute passed since the filing of said action, limiting the time within which an appeal

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may be filed to six months, was not applicable, and that plaintiff in error had one full year from the date of said judgment in which to perfect an appeal.

In this contention of plaintiff in error we cannot agree. The fact that plaintiff in error instituted her action in the superior court of Oklahoma county at a time when the statute then in force required appeals to be filed within a period of one year avails her nothing, as under an act of the Legislature approved February 14, 1911 (chapter 18, p. 35, Sess. Laws 1910-11), "all proceedings for reversing, vacating or modifying judgments, or final orders shall be commenced within six months from the rendition of the judgment or final order complained of," and this court held in the case of *Rolater v. Strain,* 31 Okla. 58, 119 Pac. 992, that the right of appeal is governed by the provisions of law applicable thereto in force at the time when the judgment was rendered.

As the act above referred to was the law applicable on January 2, 1912, when the final order in this case was made, and as the appeal was not filed in this court until July 9, 1912, this court is without jurisdiction to hear and determine the same.

The cause is accordingly dismissed.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

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NATION v. HARNESS *et al.*

No. 755. Opinion Filed November 14, 1911.

Rehearing Denied October 1, 1912.

(126 Pac. 799.)

BROKERS—Real Estate Agents—Right to Commission. When property has been listed for sale with different real estate agents, the agent who induces the seller and purchaser to enter into the contract is entitled to the commission, although another agent may have first brought the parties together.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; W. M. Bowles, Assigned Judge.

Action by D. F. Harness and T. F. Hines, partners as Harness & Hines, against William E. Nation. Judgment for plaintiffs, and defendant bring error. Reversed and remanded, with instructions.

Everest, Smith & Campbell, for plaintiff in error.

A. B. Honnold and *Giddings & Giddings,* for defendants in error.

DUNN, J. This case presents error from the district court of Oklahoma county. Plaintiff in error, who will hereafter be denominated defendant, during the year 1906, listed his farm in Cleveland county, Okla., for sale or trade with defendants in error (plaintiffs below), a real estate firm, along with two other firms in Oklahoma City. The petition avers that plaintiffs, who were real estate agents, rendered defendant services which consisted in bringing together the defendant and one A. C. Achenhausen, and the purchase of said defendant's real property by the said Achenhausen was discussed, and wherein it was proposed that Achenhausen trade a stock of harness located at Cleveland, Okla., for defendant's real property; that plaintiffs, at defendant's special request, endeavored to effect a sale or

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trade of said property by showing the same to several other parties, advertising, etc.; that as a result thereof, and in pursuance of the negotiations and efforts to secure a sale or trade of defendant's property, the defendant thereafter did trade said real property to the said Achenhausen for the said stock of harness. To this petition defendant filed a general denial, and on the issues thus made trial was had to a jury, which resulted in a verdict and judgment for plaintiffs. Motion for new trial was filed and overruled, and the cause has been lodged in this court for review.

While counsel for defendant argue several propositions in their brief, the view which we take of the case renders it necessary to notice only the error counsel allege to have been committed by the court in refusing one of the instructions offered by defendant. It appears from the evidence that defendant listed his property with plaintiffs during the month of July, 1906, and that negotiations were soon commenced with Achenhausen for the trade of his harness shop for defendant's farm. Plaintiffs failed to close the deal, but offered testimony, and counsel argue in their brief, that they did not abandon the deal, and that they were the procuring cause of the trade subsequently made by another real estate broker by the name of Brissey, and that, having performed the service of bringing the parties together, where a sale or trade was later consummated, although through the intervention of another broker, they are entitled to their commission. The court on this proposition refused to give the following instruction requested by defendant:

"The court further instructs you that, when property has been listed for sale with a number of real estate agents, the one who succeeds in bringing the seller and purchaser together and induces them to enter into the contract is the one who has earned the commission; and this is true, regardless of the question as to who first introduced the seller and the purchaser."

The refusal of this instruction, or the refusal to give it in substance, we believe was error, and for this reason the cause must be reversed. The law is well stated by the Kentucky Court of Appeals in the case of *Higgins v. Miller,* 109 Ky. 209, 58 S. W. 580, in the syllabus, as follows:

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"When property has been listed for sale with different real estate agents, the agent who induces the seller and purchaser to enter into the contract is entitled to the commission, though another agent may have first brought the parties together."

See, also, *Birch v. McNaught,* 23 Okla. 634, 101 Pac. 1049; *Scully v. Williamson,* 26 Okla. 19, 108 Pac. 395, 27 L. R. A. (N. S.) 1089, Ann. Cas. 1912A, 1265; *Roberts v. Markham et al.,* 26 Okla. 387, 109 Pac. 127.

The great weight of authority is in accord with the above statement of the law, and other cases holding to the same effect may be noted as follows: *Boswer v. Mick et al.,* 29 Ind. App. 49, 62 N. E. 513; *Baker v. Thomas,* 12 Misc. Rep. 432, 33 N. Y. Supp. 613; *Vreeland v. Vetterlein,* 33 N. J. Law, 247; *Kifer v. Yoder,* 198 Pa. 308, 47 Atl. 974; *Scott v. Lloyd,* 19 Colo. 401, 35 Pac. 733; *Carper v. Sweet,* 26 Colo. 547, 59 Pac. 45; *Witherbee et al. v. Walker,* 42 Colo. 1, 93 Pac. 1118; *Votaw et al. v. McKeever et al.,* 76 Kan. 870, 92 Pac. 1120; *Duval v. Moody,* 24 Tex. Civ. App. 627, 60 S. W. 269. See, also, note to case of *Jennings et al. v. Trummer,* 23 L. R. A. (N. S.) 164; 19 Cyc. 260, and authorities cited under note 49; and Gross on Real Estate Brokers, sec. 97.

In the consideration of the case of *Duval v. Moody, supra,* the Court of Civil Appeals of Texas, speaking through Mr. Justice Neill, said:

"The owner of real estate, by the general employment of a real estate agent or broker to effect a sale, does not thereby preclude himself from employing other agents for the same purpose. *Cook v. Forst,* 116 Ala. 395, 22 South. 540. And where a principal employs more than one broker, the one who first completes the sale is entitled to the commissions (*Glascock v. Vanfleet* [100 Tenn. 603] 46 S. W. 449), unless the exertions of another broker are the procuring cause of the sale (*Brennan v. Roach,* 47 Mo. App. 200; *Wright v. Brown,* 68 Mo. App. 577). Mr. Austin was not ready or willing to purchase the property upon Mrs. Duval's terms when presented to her by appellee; and as appellee was not the procuring cause of Austin's readiness and willingness to purchase when the sale was effected, Hampton being the efficient and procuring cause, the evidence does not sustain the judgment, and it is reversed, and the cause remanded."

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The judgment of the trial court is therefore reversed, and the cause remanded, with instructions to grant defendant a new trial.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

LAWLESS v. PITCHFORD.

No. 1067. Opinion Filed November 14, 1911.

Rehearing Denied October 1, 1912.

(126 Pac. 782.)

APPEAL AND ERROR—Brief—Effect of Defects. Rule 25 of this court (20 Okla. xii, 95 Pac. viii) provides: "The brief shall contain the specifications of the errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order." **Held,** that, where the brief does not substantially comply with this provision, the appeal will be dismissed.

(Syllabus by the Court.)

Error from Craig County Court;
Theodore D. B. Frear, Judge.

Action between P. J. Lawless and A. J. Pitchford, guardian. From the judgment, Lawless brings error. Dismissed.

Parker & Rider, for plaintiff in error.

Paul F. Mackey, for defendant in error.

WILLIAMS, J. Rule 25 of this court (20 Okla. xii, 95 Pac. viii) provides in part as follows:

"The brief shall contain the specifications of the errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order."

The brief of the plaintiff in error in no respect complies with the provisions of said rule.

The appeal is therefore dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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HUME, *Trustee,* v. BROWN SHOE CO.

No. 1091. Opinion Filed November 14, 1911.

Rehearing Denied October 1, 1912.

(126 Pac. 823.)

1. **BANKRUPTCY—Fraudulent Preferences—Knowledge of Creditor.** Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop; and where the effect of a conveyance by an insolvent to a creditor, within four months prior to his bankruptcy, was to give such creditor a preference over other creditors, it will be conclusively presumed that it was so intended; and the conveyance is voidable if it is shown that the creditor knew or had reasonable cause to believe such fact.

2. **APPEAL AND ERROR—Review — Necessity of Cross-Petition.** Alleged errors committed by the trial court, of which defendant in error complains, will not be considered, but held to be waived, where no cross-petition in error is filed.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by C. Ross Hume, trustee in bankruptcy of M. J. Duncan, against the Brown Shoe Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with instructions.

Harris & Wilson, for plaintiff in error.

R. N. McConnell, for defendant in error.

DUNN, J. This case presents error from the district court of Oklahoma county. C. Ross Hume, trustee in bankruptcy of the estate of M. J. Duncan, a bankrupt, began this action to recover of and from the Brown Shoe Company, the defendant, the value of certain property conveyed to it, contrary to the provisions of sections 60a and 60b of the national bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 St. at L. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by the act of 1903

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(Act Feb. 5, 1903, c. 487, sec. 73, 32 St. at L. 799 [U. S. Comp. St. Supp. 1911, p. 1506]). The adjudication of Duncan a bankrupt, under the facts shown, relieves us of a consideration of any of the questions presented, or sought to be presented, by counsel on this branch of the case, with the exception of the issue made by the averment that the bankrupt, with the intent to prefer the said Brown Shoe Company over and above all of his other creditors, made and delivered to defendant a chattel mortgage containing a power of sale, and the defendant received the same with knowledge of the insolvency of the bankrupt, and when it received and took possession of the stock of goods covered by said mortgage, it had reasonable ground to believe that a preference was intended. The defendant filed an answer which was in effect a general denial, and also denied specifically that the instrument was executed by the bankrupt with the intention on his part to prefer the defendant over any of the other creditors, and alleged that it had no reasonable cause to believe, and did not believe, that it was intended that defendant receive a preference, or that the chattel mortgage did constitute a preference over and above the other creditors of the bankrupt. Upon the issues thus made, the cause was tried to the court upon the evidence of the plaintiff alone, at the conclusion of which the defendant rested and submitted the cause thereon. The court in its consideration found for the defendant, and plaintiff has brought the action to this court to secure a review of the judgment rendered.

Sections 60a and 60b of the bankruptcy act under which plaintiff is proceeding read as follows:

"Section 60a. A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering

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of the transfer if by law such recording or registering is required.

"Sec. 60b. If a bankrupt shall give a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdictions."

The undisputed facts, as disclosed by the record, may be summarized as follows: The defendant, the Brown Shoe Company, had, prior to April 29, 1904, a past-due account against the bankrupt, who conducted a general mercantile business at the village of Binger, in Caddo county. On or about the 23d day of April, 1904, its counsel in Oklahoma City received from it for collection this account. Without correspondence or other information, on the 29th day of April, 1904, he traveled to Binger for the purpose of making collection. On arrival he found the debtor was not at his store, but that it was in charge of a clerk. Learning that the debtor was at Anadarko, the county seat, he proceeded to that place, and on the same afternoon took from him a chattel mortgage of the entire stock of merchandise, with authority to dispose of the same at public auction, or private sale, without notice, at the place where the property was found, or at any other place in the county, and providing for the recovery of all costs involved therein, with a 15 per cent. attorney's fee; also a specific waiver of all right and claim for damages by reason of the seizure or sale of the property under the terms of the mortgage, regardless of the price for and the manner in which the same was seized or sold. The mortgage was given to secure a note covering the claim, payable on demand, in the sum of $1,048.65. Immediately after securing the chattel mortgage, counsel for defendant, by telephone, arranged for taking immediate possession of the stock of goods by the clerk, whom he had found in charge of the bankrupt's business. Thereafter and on the succeeding day he sent from his office one of his employees to take charge of the goods, with instructions to

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sell the same as soon as possible, without unnecessary sacrifice. Six days thereafter, and on the 5th day of May, 1904, a sale was made of the stock of goods, counsel for defendant receiving approximately $1,375 therefor, out of which he paid the defendant and one other creditor the full amount of their claims, and, aside from the expenses, returned the balance, about $100, to the bankrupt. The chattel mortgage under which this was done was not filed until the morning of the day on which the sale was made.

The stock of merchandise which was taken, and a few worthless accounts, constituted the entire assets of the debtor. It was shown by several witnesses to have been of general knowledge throughout the community that the bankrupt, for some months prior to the transfer of the stock, had been negligent of his business, often leaving his store locked a day at a time, and for the month next preceding the same had not been in his store more than four days out of the week, while he drank and gambled in a dissolute manner. It was not necessary for the recovery of plaintiff in this case that the defendant should have actual knowledge of any or all of these things. It was necessary only that it or its agent had reasonable cause to believe that the bankrupt intended, in making the transfer, to give to it a preference; and the rule in such cases, as stated by the Circuit Court of Appeals of the Eighth Circuit, in the case of *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99, is that "notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop."

And in the case of *Brewster v. Goff Lumber Co.* (D. C.) 164 Fed. 124, the rule was declared that:

"Where the effect of a conveyance by an insolvent to a creditor, within four months prior to his bankruptcy, was to give such creditor a preference over other creditors, it will be conclusively presumed that it was so intended; and the conveyance is voidable if it is shown that the creditor knew or had reason to believe such fact."

Other cases supporting the same principles may be noted, as follows: *Huttig Mfg. Co. v. Edwards*, 160 Fed. 619, 87 C. C.

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A. 521; *In re W. W. Mills Co.* (D. C.) 162 Fed. 42; *McElvain v. Hardesty,* 169 Fed. 31, 94 C. C. A. 399; *Thomas v. Adelman* (D. C.) 136 Fed. 973; *Hardy v. Gray et al.*, 144 Fed. 922, 75 C. C. A. 562; *In re Andrews* (D. C.) 135 Fed. 599; *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489.

It is certain that the debtor was insolvent; that a preference was accomplished and intended; but, did the agent of the creditor have reasonable cause to believe such preference was intended? This is the question. If it had reasonable cause to believe that Duncan was insolvent when taking its payment, it must be held to have had reasonable cause to believe that a preference was intended; and, if so, the trustee is entitled to recover.

It is said, in the case of *In re Andrews, supra,* that:

"If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe that a preference is intended. * * * The payment alleged to be preferential was not made by cash on account in the ordinary course of business, but by a return of goods. Hardy testified, in substance, that he believed the bankrupt to be solvent at the date of the preference, and the referee, with whom I have conferred, was favorably impressed by Hardy's testimony, and believed it to be true. I do not find the contrary; but the undisputed circumstances mentioned above, as well as others contained in the testimony, establish that Hardy, whatever his actual belief, had reasonable cause to believe that Andrews was insolvent, and I so find."

And in the case of *McElvain v. Hardesty, supra*:

"If McElvain did not have actual knowledge of the insolvent condition of his debtors, we think, in the circumstances of this case, he is constructively chargeable with that knowledge. He took a transfer of all his debtors' property—of a going concern—in satisfaction of a debt. This in itself was an unusual thing; and the reasons which actuated it must have sprung from a fear or suspicion of danger. Solvent and prosperous business houses do not commonly pay debts that way."

And by the Supreme Court of the United States, in the case of *Walbrun v. Babbitt, supra:*

"The usual and ordinary course of Mendelson's business was to sell at retail a miscellaneous stock of goods, common to country stores, in a small town in the interior of the state of

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Missouri. It was to conduct a business of this character that the goods were sold to him; and, as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them. But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. *Scammon v. Cole,* 5 N. B. R. 257 [Fed. Cas. No. 12,432]; *Graham v. Stark,* 3 N. B. R. 357 [Fed. Cas. No. 5,676]; *Kingsbury v. Hale,* 3 N. B. R. 317 [Fed. Cas. No. 7,816]; *Driggs v. Moore,* 3 N. B. R. 602 [Fed. Cas. No. 4,083]; *Tuttle v. Truax,* 1 N. B. R. 601 [Fed. Cas. No. 14,277]. Summerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors by showing that he had paid full value for the goods in ignorance of the condition of Mendelson's affairs. But the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller; and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do; nor did he make any attempt in that direction. Indeed, he contented himself with limiting his inquiries to the object Mendelson had in selling out, and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors; for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee

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in bankruptcy, in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

In the case at bar, it appears that the agent of the creditor made virtually no effort whatsoever to ascertain the debtor's financial situation and condition; and the speed with which the entire transaction was conducted, and the fact that it involved the business suicide of the debtor, in our judgment, was such as to render conclusive the fact that the agent of the creditor had reasonable cause to believe that a preference was intended when he took and appropriated all of the debtor's property to the payment of his client's debt. Solvent business houses do not pay debts that way. The entire transaction bears evidence of such reckless disregard of the ordinary precautions taken by solvent men in their dealings that we cannot but find that error was committed in holding that the creditor did not have reasonable cause to believe it was securing a preference, and that the same was intended. Under these circumstances, the judgment of the trial court will be reversed, and, as the defendant submitted the cause upon the evidence submitted by the plaintiff, the same will be remanded with instructions to set aside the judgment heretofore entered and enter one against the defendant for the amount received by its agent for the goods sold, which appears from the evidence to be $1,375. *Douglass v. Anderson,* 32 Kan. 350, 4 Pac. 257.

Counsel for defendant seeks to present in his brief the error which he contends the court committed in overruling his motion striking at the service had in this case; it being his claim that the same was insufficient to secure jurisdiction of the defendant, and that the judgment rendered herein was therefore void. No cross-petition in error setting forth this error was filed; and, in the absence thereof, the error complained of, if any existed, cannot be considered, and will be held to have been waived. *Turner v. Mills et al.,* 22 Okla. 1, 97 Pac. 558; *Paulter v. Manuel,* 25 Okla. 59, 108 Pac. 749; *Missouri Pacific Ry. Co. v. Lea,* 47 Kan. 268, 27 Pac. 987; Burdick, New Trials and Appeals, sec. 177.

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The case is accordingly reversed and remanded to the trial court for judgment in accordance with the foregoing.

TURNER, C. J., and HAYES, WILLIAMS, and KANE, JJ., concur.

NATIONAL BANK OF COMMERCE OF GUTHRIE v. LEE *et al.*

No. 1278. Opinion Filed January 9, 1912.

Rehearing Denied October 1, 1912.

(126 Pac. 782.)

1. **COUNTIES—Indebtedness—Warrant.** One of a series of ten warrants or certificates in the following form:

"Number 2. Dollars.
"$9,540.00.

"Oklahoma Territory.
"Mangum, Okla., July 21, 1905.

"To the County Treasurer of Greer County, Oklahoma:

"On the first day of July, 1907, pay to the order of L. F. Lee and A. O. Campbell nine thousand, five hundred and forty ($9,540.00) dollars, without interest, to be paid out of and charged to the levy for the court fund.

"This certificate evidences moneys due and payable at the date named therein for the erection of a courthouse for Greer county, Oklahoma Territory, 'on the rental plan,' under and by virtue of section two (2), article eight (8), chapter thirty-two (32) of Sess. Laws 1897 of Oklahoma Territory, and is for the payment of rents for a courthouse for said county for the year beginning July 1, 1907, and ending July 1, 1908, and is evidence of the sum that shall become due for such yearly rentals as provided by a certain contract in writing of even date herewith and is expressly subject to all the conditions of said contract.

"This certificate not to be registered. J. J. Adams, Pro tem. Chairman Board of Commissioners, Greer County, Oklahoma Territory.

"Attest: Floyd McNeill, County Clerk. [Seal.]"

Indorsed on back as follows: "Lee & Campbell, L. F. Lee and A. O. Campbell"—attached to a rental contract, is payable, upon presentment to the county treasurer, without further auditing or demand, provided the terms of the contract therein described have been complied with, which is a judicial question.

2. **GUARANTY — Distinguished From Other Transaction — Assignment.** Where such warrant is assigned to a bank by a partnership,

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composed of the individuals named on its face, which at the time of the assignment is admitted to be the owner and holder thereof, it will be presumed that the names of the individuals written across the back thereof were placed there for the purpose of assigning the warrant to the partnership, and that the name of the partnership was signed for the purpose of assigning it to the bank and not for the purpose of guaranteeing its payment.

(Syllabus by the Court.)

Error from District Court, Greer County; G. A. Brown, Judge.

Action by the National Bank of Commerce of Guthrie against L. F. Lee and another, copartners doing business as Lee & Campbell, and the Board of County Commissioners of the County of Greer. Judgment for defendants, and plaintiff brings error. Reversed in part, and modified in part.

Devereux & Hildreth, for plaintiff in error.

H. D. Henry, Co. Atty., for defendants in error Board of Com'rs of Greer County.

Shartel, Keaton & Wells, for defendants in error Lee and another.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below, to recover a certain amount, alleged to be due plaintiff on a warrant issued by the board of county commissioners of Greer county, to apply on the construction of a courthouse on the rental plan. The instrument sued upon was one of ten of like tenor, which the contractors, L. F. Lee and A. O. Campbell, sold and assigned to the plaintiff, and is in words and figures as follows:

"Number 2. Dollars.
"$9,540.00

"Oklahoma Territory.
"Mangum, Okla., July 21, 1905.

"To the County Treasurer of Greer County, Oklahoma:

"On the first day of July, 1907, pay to the order of L. F. Lee and A. O. Campbell, nine thousand, five hundred and forty ($9,540.00) dollars, without interest, to be paid out of and charged to the levy for the court fund.

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"This certificate evidences moneys due and payable at the date named therein for the erection of a courthouse for Greer county, Oklahoma, 'on the rental plan,' under and by virtue of section two (2), article eight (8), chapter thirty-two (32), of Sess. Laws 1897 of Oklahoma Territory, and is for the payment of rents for a courthouse for said county for the year beginning July 1, 1907, and ending July 1, 1908, and is evidence of the sum that shall become due for such yearly rentals as provided by a certain contract in writing of even date herewith and is expressly subject to all the conditions of said contract.

"This certificate not to be registered. J. J. Adams, *Pro tem.* Chairman Board of Commissioners, Greer County, Oklahoma Territory.

"Attest: Floyd McNeill, County Clerk. [Seal.]"

Indorsed on back as follows: "Lee & Campbell, L. F. Lee and A. O. Campbell."

On the 1st day of July, 1907, the date when said certificate, upon its face, appeared to be due, it was presented for payment to the treasurer of Greer county, who refused to pay the same; and on the 5th day of the same month it was again presented to said treasurer and payment again refused, whereupon it was protested for nonpayment. A copy of the warrant and of the contract therein mentioned and the notary's certificate of protest were attached to the petition of the plaintiff and made part thereof. It was alleged that defendants Lee & Campbell, L. F. Lee and A. O. Campbell, individually, were liable upon the certificate as guarantors; that they had notice of the nonpayment of said certificate and said protest thereof, but upon demand failed and refused to pay the same. The defendant the board of county commissioners filed a demurrer to the petition, which was sustained as to it, and the cause came on to be heard upon the answer of the other defendants, which practically admitted the allegations in the plaintiff's petition in relation to the issuance of the certificate, its assignment, etc., and further alleged, in substance, that said defendants indorsed said certificate to said plaintiff, but did so under a written and verbal contract therewith, providing that by doing so they should not be liable to plaintiff thereon as an indorser, but that such indorsement should only vest the title to the said certificate and

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subrogate it to the rights of these defendants. A copy of the contract mentioned in the answer was attached thereto and made a part thereof. The evidence introduced by the plaintiff consisted of the certificate, with its indorsements, the contract, and the protest attached to its petition. A demurrer to its evidence was sustained; whereupon a judgment for costs was entered for the defendants, to reverse which this proceeding in error was commenced.

It seems that the demurrer to the petition was sustained upon the ground that as the plaintiff failed to present its certificate or warrant to the board of county commissioners and have it audited by them, and a warrant issued in its place, the county treasurer would not be authorized to pay the claim. This, we think, was error. The warrant sued upon is signed by the chairman of the board of county commissioners, attested by the clerk, and sealed with the county seal and directed to the treasurer, and is couched in language directing the treasurer to pay the same on the 1st day of July, 1907. Upon its face it bears the imprint of a warrant, and we see no reason for according it any other status. That the issuance of another warrant was not contemplated by the board, or the contractors, is clearly apparent from section 7 of the contract, which reads as follows:

"The said second party hereby agrees and contracts by and with the first parties to rent and lease said courthouse of and from the said first parties when so completed for a period of ten years from the date of said completion, and do hereby agree to pay first parties for the use and occupancy of said building for a period, or to their order in all the sum of $95,400.00 to be paid in ten annual installments or payments of $9,540.00 each, for the full period of ten years, each of said annual payments evidenced by ten separate certificates or coupons for the sum of $9,540.00 each, made, executed and delivered of even date herewith by the party of the second part and payable to the said first parties, or their order, at the office of the treasurer of Greer county, territory of Oklahoma, the first of said certificates or coupons due and payable on the first day of July, 1906, and thereafter and on each and every succeeding year a like certificate until the whole number thereof shall be fully paid and discharged. Said certificates or coupons are drawn on

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the court fund of said county and are expressly subject to all the conditions of this contract, and payable each as detachable parts of this contract whenever any annual installment represented by the same shall become due and payable under the provisions of said contract, but said separate coupons shall be of no greater force or effect than this contract. The sole purpose thereof is to enable the holder of this contract to present by himself or his order each and any of said certificates or coupons for payment when the rent moneys, as thereby evidenced, shall become due and payable under the provisions of this contract, which shall be paid upon presentment when due, without the holder thereof presenting this contract; and the said second party agrees, that to meet said payments herein provided for, the board of county commissioners of said county, acting for the county, shall each year during the life of this rental contract make an additional levy for the court fund on all property in Greer county, territory of Oklahoma, subject to taxation in such sum as will pay the annual rentals including the delinquencies that may at any time exist, but in no event to exceed the rate of levy provided by law. The proceeds of such levy to be by the county treasurer of said county applied to the payment of the rental of said building, it being understood that the revenues to be derived from the additional court levy to be made from year to year as above set forth are specifically set aside for the payment of the annual rental payments provided for under this contract and evidenced by said certificates or coupons and for the faithful application of which said revenues from year to year as said tax is levied and said annual rentals become due and payable, the said second party acknowledges itself firmly bound by these presents to said first parties."

Moreover, the payment of the warrant or certificate was not refused upon the ground that the same was not presented to the board of county commissioners, but, as shown by a copy of the protest attached to plaintiff's petition, upon the ground that the amount of said warrant was "not due under the contract." This is purely a judicial question; and, as the petition shows upon its face that the warrant was due, if there were any extrinsic facts available to show that it was not, they must be set up by way of answer. The case at bar belongs to the same class as *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99; *Lincoln County v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; *Chicot County v. Sherwood*, 148 U. S. 529, 13

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Sup. Ct. 695, 37 L. Ed. 546; *Clapp v. Cedar County,* 5 Iowa, 15, 68 Am. Dec. 678; *Vincent v. Lincoln County* (C. C.) 62 Fed. 705; *Waitz v. Ormsby County,* 1 Nev. 370. The syllabus to *Vincent v. Lincoln County, supra,* is as follows:

"Gen St. Nev. secs. 1950, 1964-1966, requiring presentation of claims and accounts to the county commissioners and county auditor for allowance and approval, apply only to unliquidated claims and accounts, not to bonds and coupons, nor to a judgment upon bonds and coupons; and such presentation is not necessary before an action on such a judgment."

Discussing the propositions involved in the opinion, Mr. District Judge Hawley said:

"The questions presented are virtually settled by the decision of the Supreme Court of the United States, in *Lincoln Co. v. Luning* [*supra*], where the court, in answering a similar contention, said: 'It is further objected that the complaint was defective in not showing that the bonds and coupons had been presented to the county commissioners and county auditor for allowance and approval, as provided by sections 1950 and 1964-1966 of the General Statutes of the state. Those sections, referring to claims and accounts, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. This question was presented in the case of *County of Greene v. Daniel,* 102 U. S. 187, 194 [26 L. Ed. 99], in which the court observed, speaking of bonds and coupons, that "the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day." '"

On the second proposition, counsel for plaintiff in error contended that, inasmuch as the warrant or certificate was made payable to L. F. Lee and A. O. Campbell, and the same was indorsed by L. F. Lee and A. O. Campbell individually, and by Lee & Campbell, a partnership, the indorsement of Lee & Campbell, as a partnership, must be presumed to have been made for the purpose of guaranteeing the payment of the warrant. The authorities they cite in support of their contention belong to the class of *Rogers v. Shulenburg et al.,* 111 Cal. 281, 43 Pac. 899, wherein it is held:

"A third person who writes his name on the back of a nonnegotiable note becomes a guarantor thereof, whether the in-

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dorsement is made before or after delivery; and, under the Codes, it is not necessary that the consideration of the guaranty be expressed in writing in either case."

We do not believe the case at bar belongs to that class of cases. The record shows that the warrant or certificate was issued to L. F. Lee and A. O. Campbell individually; but the petition of plaintiff alleges that at the time of the assignment thereof it belonged to Lee & Campbell, a partnership, and the contract in relation to its assignment was between Lee & Campbell, a partnership, and the plaintiff. Even if we should hold Lee & Campbell, a partnership, to be a third person, within the meaning of the California case heretofore cited, under the facts of this case the natural presumption would be that the indorsement of L. F. Lee and A. O. Campbell, as individuals, was for the purpose of transferring the title to Lee & Campbell, a partnership; and that the indorsement as a partnership was for the purpose of transferring the title to the plaintiff. From that viewpoint the case is governed by *Pattee Plow Co. v. Beard,* 27 Okla. 239, 110 Pac. 752, Ann. Cas. 1912B, 704, wherein it is held:

"The payee of a nonnegotiable instrument who writes his name across the back thereof and sells and delivers the same does not thereby render himself liable to the assignee on such note, either as an indorser or guarantor."

It follows that the judgment of the court below must be reversed in part and modified in part. As to the board of county commissioners, the cause is reversed and remanded, with directions to overrule its demurrer and permit it to plead further, if it so desires. As to Lee & Campbell and L. F. Lee and A. O. Campbell, it must be rendered in accordance with this opinion, unless other facts develop which take it out of the rule herein laid down.

TURNER, C. J., and HAYES, J., concur; WILLIAMS and DUNN, JJ., absent, and not participating.

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MIDLAND VALLEY R. CO. v. PUGH.

No. 1741. Opinion Filed May 14, 1912.

Rehearing Denied October 1, 1912.

(126 Pac. 759.)

1. **CARRIERS — Transportation of Live Stock — Action for Injuries—Parties.** Evidence examined, and **held** sufficient to show that the plaintiff is the real party in interest, and therefore the proper party to prosecute the action.

2. **SAME—Care Required.** The mere fact that it is shown that the owner of a shipment of live stock accompanied the same does not relieve the carrier of any of its common-law liability, in the absence of proof that the shipper specially agreed, as a part of the contract of transportation, that he would care for the animals.

(Syllabus by the Court.)

Error from Haskell County Court;
A. L. Beckett, Judge.

Action by W. A. Pugh against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edgar A. de Meules, for plaintiff in error.

Fred H. Fannin, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for injuries to live stock, occasioned by delay in the transportation thereof. Upon trial to a jury, there was a verdict for the plaintiff, upon which judgment was rendered, to reverse which this proceeding in error was commenced.

The first assignment of error is that the court erred in overruling the demurrer of the defendant to the evidence of the plaintiff. This assignment is based upon the theory that the cause of action is improperly brought, because there is no evidence tending to show that the plaintiff was the owner of the

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cattle, and therefore entitled to sue under the provision of the statute which provides that all actions must be prosecuted in the name of the real party in interest. We think there is sufficient evidence on that point. The evidence shows that the plaintiff delivered the cattle to the railroad company for shipment; that he accompanied them from the point of shipment to the point of destination; that at Warner, the point of destination, he was endeavoring to induce the railroad employees to place the car containing the cattle so it could be unloaded with convenience, and said to them:

"I told them that I was going to sue them if they didn't unload my cattle. There was some of my cattle down, and I wanted to get them unloaded that night."

In answer to the question, "How many cattle did you lose?" he answered: "Thirteen head. These that wasn't killed were worthless." There are other circumstances disclosed by the record that tend to show that the plaintiff was not only the consignor and consignee, but also the owner, of the shipment, and therefore, under the authorities, the real party in interest. 6 Cyc. 510; *Louisville, etc., R. Co. v. Wathen*, 49 S. W. 185, 22 Ky. Law Rep. 82; *Swift v. Pacific Mail Steamship Co.*, 106 N. Y. 206, 12 N. E. 583.

The next assignment is to the effect that the court erred in overruling the demurrer to the evidence, upon the ground that the same did not tend to show negligence on the part of the plaintiff in error. We think there was sufficient evidence on that point to take the case to the jury. Defendant's contention is based upon the theory that because the plaintiff accompanied the shipment proof that the cattle were received in good condition and received in bad condition at their destination was not sufficient to entitle the plaintiff to recover, but that he must also show that the injuries were caused from the defendant's negligence. We do not believe, however, that this case belongs to the class of cases to which that rule applies. This action, as is admitted by counsel for plaintiff in error, was solely for the purpose of recovering damages for a violation of a common-law duty by a common carrier of freight. It is true that the evidence shows that

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the plaintiff accompanied the shipment; but it does not show that he accompanied it under any contract or arrangement with the carrier whereby he undertook to relieve it of any of its common-law liability. The cases cited by counsel for plaintiff in error belong to a well-known class which hold that, where the owner contracts with the carrier to take charge of the cattle during transportation and accompanies them for that purpose, he thereby relieves the carrier of part of its ordinary, common-law liability, and if injury arises by the negligence of the shipper in not giving the animals proper care the carrier will not be held liable therefor. We think, however, that in cases like this, where the carrier's common-law liability is not limited by contract, the company should be held to the degree of diligence and care that is ordinarily required of a carrier at common law. *Hendrick v. Boston R. Co.*, 170 Mass. 44, 48 N. E. 835; *Schaeffer v. Philadelphia, etc., R. Co.*, 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; *Hance v. Pac. Exp. Co.*, 66 Mo. App. 486.

We have examined the record with considerable care, and are satisfied that on the whole the plaintiff in error has had a fair and impartial trial, and that no error has been committed that would justify this court in reversing the judgment of the court below.

The judgment of the court below is therefore affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

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SHELBY *et al.* v. FARVE *et al.*

No. 1851. Opinion Filed June 25, 1912.

Rehearing Denied October 1, 1912.

(126 Pac. 764.)

1. **INSANE PERSONS—"Incompetent"—"Mentally Incompetent"—"Incapable."** The phrases "incompetent," "mentally incompetent," and "incapable," as used in article 15, c. 86, secs. 5485, 5486, Comp. Laws 1909, mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons.

2. **SAME—Guardian of Estate—Appointment.** Under the provisions of sections 5485 and 5486, Comp. Laws 1909, the county court alone is authorized to appoint a guardian of the estate of a person who is mentally incompetent to manage the same, although such person may be able to care for his person, whenever it appears that by reason thereof he would be likely to be deceived or imposed upon by artful or designing persons.

(Syllabus by the Court.)

Error from District Court, Marshall County; D. A. Richardson, Judge.

Action by David Shelby and others against Marcelene Farve and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with instructions.

W. J. Gregg, U. S. Atty., and *J. C. Denton,* Asst. U. S. Atty., for plaintiffs in error.

H. A. Ledbetter, for defendants in error.

DUNN, J. This case presents error from the district court of Marshall county. On May 29, 1909, the plaintiffs in error filed a petition in the county court of the said county asking for the appointment of a guardian or guardians of Marcelene Farve and Stella Farve, defendants in error, on the ground that they were mentally incompetent to manage their property. Thereafter, and on June 15, 1909, the said county court, on a hearing, found:

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"The said Marcelene Farve and Stella Farve are both adult fullblood Mississippi Choctaw Indians, that each of them is ignorant, uneducated, and mentally incompetent to transact her business and to manage her property, and the court further finds that the said Marcelene Farve and Stella Farve own by inheritance from their mother Melvina Jackson an allotment of the tribal lands situated in Carter county, Okla., on which are valuable asphalt deposits, and that, by reason of said asphalt deposits, said allotment of land is of the value of $40,000 or more. The court further finds that there is now a mineral lease on said lands and revenues arising therefrom in the way of royalties amounting to from $900 to $1,200 a year. The court also finds that the said Marcelene Farve and Stella Farve have attempted to sell said lands for a grossly inadequate consideration, and that, unless a guardian of their estate is appointed, they are liable to sell their interests in said estate for a grossly inadequate consideration, and that it is proper and necessary that a guardian be appointed to take care of and protect their said property."

From this order the defendants in error appealed to the district court on questions of law and fact. On November 27, 1909, the petition came on for trial *de novo* before the court without a jury. At the conclusion of the evidence, the defendants in error filed a demurrer thereto on the ground that the same was insufficient to warrant the appointment of a guardian under the statutes of Oklahoma, which demurrer was by the court sustained, and the case, after denial of motion for new trial, has been brought to this court for review.

On passing on the demurrer, the court found from the evidence that the defendants in error were competent to take care of themselves so far as their persons were concerned, but that they were so ignorant in so far as the value of property was concerned that it was probable that they would, if permitted, make an improvident disposition of the same. The court held that it was not warranted under the law to appoint a guardian over the defendants in error for the sole reason that they were incapable of managing their property, for the reason that it was authorized to do so only when the persons were shown to be mentally incapable of taking care of both their property and their persons. So that the question as it presents itself to this court is the extent of the jurisdiction vested in county courts to appoint

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guardians for the estates of mentally incompetent persons, although it may find that the evidence is not sufficient to warrant the appointment of a guardian over their persons.

Section 13 of article 7, para. 198, Williams' Ann. Const. Okla., provides:

"The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis,* and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons *non compos mentis,* and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof. * * *"

Section 5485, Comp. Laws 1909, provides:

"When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person if able to attend, must be produced before him on the hearing."

Section 5486, *Id.,* provides:

"If after a full hearing and examination upon such petition, it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this article specified."

The question is presented and argued by counsel for plaintiffs in error that these sections of the statute, which were laws of the territory of Oklahoma, were not repugnant to the Constitution nor locally inapplicable, and hence were by section 2 of the Schedule to the Constitution extended to and remained in force in the state of Oklahoma, and in this contention we concur. And it is further insisted by counsel that notwithstanding the fact that the language of section 5486, *supra,* provides that, "if after a full hearing * * * it appears to the judge of the county court that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian,"

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under the general probate powers conferred upon the county court the jurisdiction exists to appoint a guardian for the estate of one mentally incompetent or incapable of managing his property, although such person may be competent to care for himself. This question does not appear to have arisen before, nor received the consideration of, the courts of the territory or of this state. It was, however, presented to the Court of Appeals of Missouri in the case of *Easley v. Bone,* 39 Mo. App. 388, wherein a statute similar to that before us was before that court for consideration. Section 5791, Rev. Sts. of Missouri 1879, relating to this subject, reads as follows:

"If it be found by the jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person *and* estate of such insane person."

The question involved in that case was the same as here, the authority of the court to appoint a guardian for the estate of a party without embracing within it the guardianship of his person. It is to be noted that the question is one of power and jurisdiction, and on this Judge Seymour D. Thompson, who prepared the opinion for the court, said:

"We have come to the conclusion, though not without some hesitation, that where a person has been adjudged insane, in conformity with the statute, and no one can be found who will accept the office of guardian of his person because of his dangerous character, the court has power, for the purpose of conserving his estate, to appoint a guardian of his estate merely; and we attach no importance to the fact that the order of appointment designates the appointee as 'curator' instead of 'guardian'; the meaning of the two words, when applied to the care of an estate merely, being the same. A very strict reading of the statute might lead to the conclusion that the grant of jurisdiction is to appoint a person who shall be at once guardian of the person and of the estate of the insane person; but we think that it is capable of being read in conformity with the mathematical axiom, that the whole includes all its parts, so as to reach the conclusion that a grant of jurisdiction to appoint a guardian of the person and of the estate includes a jurisdiction to appoint a guardian of the estate only, where insurmountable obstacles preclude the appointment of a guardian who will act in both capacities."

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The question is solely one of jurisdiction and authority. If this is lacking, the power to appoint a guardian for the estate without at the same time including the person therein would be wanting, no matter what the cause.

It is to be noted that the court found specifically that the parties for whom the guardian was sought were so ignorant in so far as the value of their property was concerned that it was probable that they would make an improvident disposition of the same. The question therefore arises, Is this finding of fact by the trial court sufficient to bring the parties within the language of sections 5485 and 5486, *supra,* that they were *mentally incompetent* to manage their property or *incapable* of managing their property? These identical statutes are contained in the Code of California, being sections 1763 and 1764, Kerr's Cyc. Codes of California. The Legislature of that state has undertaken to define the meaning of these words, and section 1767, *Id.,* provides:

"The phrase 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or for any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

This definition in our judgment fairly expresses the meaning intended by our Legislature when these provisions were passed. Our own statute (section 5033, Comp. Laws 1909) defines persons of unsound mind as being "idiots, lunatics and imbeciles." It is clear that these parties do not come within any of those definitions, but it seems to us that the finding of the court that they were so ignorant in so far as the value of their property was concerned that it was probable they would make an improvident disposition thereof is the situation contemplated by the statutes under which this proceeding was brought, and that it is amply supported by the evidence.

Upon examination, Marcelene Farve, called on behalf of petitioners, testified in reference to her land:

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"Q. Has anybody ever tried to buy it from you? A. Yes. Q. Who? A. One time we sold it to George Criner. Q. How much did he give you for it? A. He was aiming to give me $450, but he didn't give me all, he just gave me $350, and gave me hundred dollar note. Q. Was that for your full interest in the land? A. Yes. Q. And were you willing to sell it to him for that price? A. Why, yes. Q. Did you sign a deed? A. Yes, sir. Q. Do you own a half interest in that land? A. No. Q. What interest do you own? A. I don't know. Q. Do you know what interest you own in that land? A. No, sir. Q. Have you got any brothers? A. No, sir. Q. How many sisters have you? A. Just one. Q. What's her name? A. Stella Farve. Q. These the only children your mother had, you and Stella? A. Yes, sir. Q. And you were going to sell your interest in that land to this man Criner for $450? A. Yes, sir. Q. Were you willing to do that? A. Yes. Q. Did he tell you that was all it was worth? A. Yes; he said that's all it was worth. Q. Did you believe that? A. I don't know. He said that's all it was worth. Q. Well, have you ever sold it to anybody else besides him? A. No. Q. Has anybody else ever tried to buy it from you? A. Yes, sir. Q. Who? A. Walter Colbert. Q. Did you sell it to him? A. No, sir. Q. When was it this man Criner tried to buy it from you—how long ago? A. It was in 1908 I believe. Q. Since your mother died? A. Yes, sir. Q. That was last year? A. Yes, sir. Q. Did you sign a deed to Walter Colbert? A. No, sir. Q. Are you sure that you didn't? A. I don't know. Q. Have you ever signed any paper for Mr. Colbert? A. Yes, sir. Q. Do you know what it was? A. I don't know. You all got me puzzled now. Q. You may just tell the court what the transaction was you had with Mr. Colbert. Do you understand that question? You can tell the court what the trade was between you and Mr. Colbert, if there was any. A. I can't answer that. Q. You mean that you don't know? A. No. Q. You don't know? A. I don't know. Q. Did you sign any papers for him? Do you know whether you signed any papers for him? A. Yes; I believe I did sign papers. Q. But you don't know what it was—did he tell you anything about this land out here that used to belong to your mother? A. Yes, sir. Q. What did he say about it? A. He said he wanted to buy it. Q. How much did he say he would give you for it? A. Ten hundred and forty dollars. Q. Was that to you for your share or to you and Stella both? A. For my share. Q. Did he pay you any money? A. No, sir. Q. Has he ever paid you any money on it? A. No; he just give me $25. Q. And you signed a paper for him? A. Yes."

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Stella Farve was interrogated, and her testimony was as follows:

"Q. Can you read? A. No, sir. Q. Can you write? A. No, sir. Q. Did you ever go to school? A. No, sir. Q. Do you know how to figure? A. No, sir. Q. What was your mother's name? A. Melvina Jackson. Q. And she died sometime in March last year? A. I can't tell you exactly how long it has been. Q. Do you know when she died? A. Yes. Q. Where did she die? A. Died on Hickory, about ten miles from Ardmore. Q. Did she have an allotment when she died? A. Yes. Q. Do you know where it is? A. Close to Ardmore, about six miles. Q. What direction; do you know what direction it is from Ardmore? A. No. Q. Have you ever seen it? A. No. Q. Have you ever been on it? A. No. Q. Do you know what kind of land it is? A. No, sir. Q. Do you know what's on it? A. No, sir. Q. Do you know what it is worth? A. No; I don't know what it is worth. Q. Your mother had only two children—you and your sister? A. Yes, sir. Q. You and your sister claim that land now? A. Yes, sir. Q. Why haven't you ever been on the land and investigated to see what it was worth? A. We couldn't live on the land because it don't have any house on it. Q. You have an allotment of your own, haven't you? A. No; I haven't got any. I am not on the roll. Q. Why, didn't you come here in time? A. Yes; I come here in time, but I was mixed breed. Q. Is your sister, Marcelene, enrolled? A. Yes; she's on the roll. She's a full-blood. Q. You are only half-sisters then? A. Yes, sir. Q. Have you ever tried to sell that land that your mother used to own, to anybody? A. Yes; I did. Q. To whom? A. Walter Colbert. Q. How much was he to give you for it? A. I don't know. Q. Did you ever try to sell it to anybody else, or did anybody else ever try to buy it from you? A. No. Q. Didn't Mr. Criner try to buy it? A. Yes; he's the one that tried to buy it first. Q. Did you ever sign a deed? A. Yes; and he give it to us back. Q. How much was he to give you for it? A. I don't know. He promised me first—said he would give me $300. Q. Were you willing to take that for it? A. Yes, sir; I was. Q. Did you sign a deed to him for it? A. Yes. Q. Do you know how much Walter Colbert agreed to give you for it? A. No. Q. You don't know how much. Did you sign any papers for Walter Colbert? Did you ever sign any papers or make your mark to any papers for Walter Colbert? A. No; not yet. Q. Have you got any agreement with him about signing any papers for him? A. Yes; I will sign them if they will let me sign them. It got all

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tangled up. Q. How much was he to give you for it? A. About a thousand dollars I reckon. Q. Were you willing to take that for it? A. Yes; I was. Q. Did Mr. Criner tell you that $300 he was going to give you was all the land was worth? A. Yes. Q. Did you believe that? A. I didn't exactly believe it. I didn't have nothing, didn't have no money. That's the reason I took it. Q. You thought it was worth more than that? A. Yes. Q. Did he say it was worth that much? A. Yes. Q. Did he say that was all it was worth? A. Yes. Q. Do you believe that's all it is worth? A. I guess better take a thousand dollars; not get nothing now. * * * Q. You say your husband is dead? A. Yes. Q. With whom do you live now? A. With my sister. Q. Did you ever have any money in the bank? A. No. Q. Did you ever own any land? A. No, sir. Q. Have you ever owned any property of any kind yourself? A. No, sir. Q. Do you know what asphalt is? A. No, sir. Q. Did you ever see any? A. No. Q. Do you know what asphalt is worth? A. No. Q. Do you know what land is worth that's got asphalt on it? A. No. Q. Do you remember when your mother filed on this land at the land office? A. No, sir. Q. You didn't go with her? A. No, sir. Q. Were you living here then? A. Yes, I was. Q. Can you figure? A. No, sir. Q. Do you know how many five dollar bills it takes to make a hundred? A. Yes. Q. How many? A. I ain't going to tell you, though. Q. Tell the court. You aren't telling me. The court: Answer the question. A. I ain't going tell. The court: Well, you must answer. Tell him how many. A. Don't believe I could tell you. Q. Who brought you down here today? A. Myself. Q. Did you pay your expenses? A. Yes, sir. Q. How many deeds you say you signed to your mother's land? A. Signed for George Criner, that's all. Q. Did you sign one to W. B. Frame? A. I don't know. Q. Did you ever have any deal with him about the land? A. Don't know. Q. Did he ever pay you any money in connection with the land? A. No; George Criner did, but not him. Q. You never had any money in the bank? A. No, sir. Q. Do you know what a check is? A. Yes, sir. Q. Can you write one? A. How can I write one when I said I don't know how to write? Q. Can you read? A. No. Q. Did you ever go to school? A. No, sir."

David Shelby, who testified that he held the position under the United States government of district agent, testified that the land contained asphalt, and in his judgment was worth

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$40,000, and that he had refused to recommend a deed for $10,000 for Marcelene's share.

From the foregoing and other testimony contained in the record we are convinced that these parties were mentally incompetent and incapable of protecting themselves in their estate, and that, by reason thereof, they are not only likely, but absolutely certain, to be deceived and imposed upon by artful and designing persons, and the jurisdiction and authority is vested in the county court to appoint a guardian or guardians to protect them.

Accordingly, the judgment of the district court is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

Ex parte LOGAN.

WILLIAMS v. SALE *et al.*

No. 2108. Opinion Filed January 9, 1912.

Rehearing Denied October 1, 1912.

(126 Pac. 800.)

HABEAS CORPUS—Appellate Jurisdiction. An appeal does not lie to this court from an order in **habeas corpus** remanding a party held for extradition for a criminal offense.

(Syllabus by the Court.)

Williams, J., dissenting.

Error from District Court, Cleveland County; R. McMillan, Judge.

Application of Robert Logan, by B. F. Williams, Jr., for *habeas corpus* to I. B. Sale and others. Application denied, and petitioner brings error. Proceeding in error dismissed.

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J. B. Dudley, B. F. Williams, Jr., and *S. A. Horton,* for plaintiff in error.

Jackson & Eagleton and *G. G. Graham,* for defendants in error.

DUNN, J. This case presents error from the district court of Cleveland county. Plaintiff in error, Robert Logan, being held in the county jail of Cleveland county for the purpose of extradition for an offense alleged to have been committed in the state of Tennessee, by and through Ben F. Williams, Jr., Esq., brought *habeas corpus* in the district court of said county to secure his release. The court denied the application, and remanded him to the custody of the sheriff and jailer of the said county, where it appears he has since been held. Time was taken to prepare, make, and serve a case-made for this court, and the same has been duly lodged herein.

Counsel for defendants in error have filed a motion to dismiss the same, for the reason that the order made by the court is not of that final and conclusive character necessary to support a proceeding in error, and that no right of appeal to this court exists. The question presented and argued has recently been passed upon by the Criminal Court of Appeals in the case of *Ex parte Johnson,* 1 Okla. Cr. 414, 98 Pac. 461, and by this court in *Wisener, Sheriff, v. Burrell,* 28 Okla. 546, 118 Pac. 999, 34 L. R. A. (N. S.) 755, and in each of these cases it was held that an appeal does not lie from such an order. The conclusion was reached after a full consideration of the question, and in our judgment is supported by the weight of authority and the better reasoning, and we find in the arguments of counsel in this cause no reason to change the same.

The motion is accordingly sustained, and the proceeding in error dismissed.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., dissenting.

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KANSAS CITY, M. & O. RY. CO. v. BRANDT.

No. 2178. Opinion Filed November 14, 1911.

Rehearing Denied October 1, 1912.

(126 Pac. 787.)

APPEAL AND ERROR—Dismissal—Insufficient Case-Made. Where the certificate of the trial judge to a case-made fails to show that the case-made was signed and settled at the place designated in the notice to defendant in error as the place of signing and settling the same, and it is made to appear by the uncontroverted affidavit of defendant in error that he was present at the designated time and at the place designated in the notice during the entire day for the purpose of urging the incorporation into the case-made of amendments theretofore suggested by him within the time allowed by order of the court, and that the case-made was not presented at such place on the designated date, the case-made will be held a nullity, and the proceeding in error dismissed, where no errors are urged for reversal that can be reviewed upon transcript of the record, and those relied upon can be presented only by a case-made.

(Syllabus by the Court.)

Error from District Court, Major County; M. C. Garber, Judge.

Action between the Kansas City, Mexico & Orient Railway Company and William Brandt. From the judgment, the railway company brings error. Dismissed.

John A. Eaton and *Dudley W. Eaton,* for plaintiff in error.

A. Fairchild and *E. C. Wilcox,* for defendant in error.

HAYES, J. On the 30th day of July, 1910, plaintiff in error in this case served upon counsel for defendant in error its notice that on the 6th day of August, 1910, at the hour of 11 o'clock a. m., or as soon thereafter as counsel could be heard, the case-made in this cause, with amendments theretofore suggested by defendant in error, would be presented to the trial judge at his chambers at Enid for settlement. The certificate of the trial judge certifies that the case-made was signed and

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settled in the city of Enid on the 6th day of August, 1910, but it does not disclose whether it was signed and settled at the chambers of the judge. The case-made fails to disclose whether defendant in error was present at the time and place of settling same, or whether, if any amendments were suggested, they were allowed or refused. While all matters relating to the service of the case-made and to the notice of time and place of settling and signing of same should be made to appear from the case-made, when it is not done, it may generally be done by evidence outside of the case-made. *Burnett et al. v. Davis*, 27 Okla. 124, 111 Pac. 191. One of the counsel for defendant in error has filed his affidavit herein, which has not been controverted, which states that on the 6th day of August, 1910, the date on which the case-made purports to have been signed and settled, he went to the chambers of the trial judge at the city of Enid and remained there throughout the entire day, and the trial judge did not appear on that date, and that the case-made was not presented for signing and settling at that place on that day, and that he endeavored to find counsel for plaintiff in error, in order to be present when the case-made was presented, but was unable to do so, and it is further made to appear that the trial judge had at that time resigned. In the absence of the case-made or the certificate of the judge thereto, showing that the same was signed at the place designated by the notice, it must be taken as established by the uncontroverted affidavit that it was not signed and settled at the appointed place. The time and place of settling a case-made fixed by the notice, unless waived, is jurisdictional, and the importance of such rule is disclosed by this case, because defendant in error did everything within his power to meet the requirements of the notice, and to protect his rights by being present to urge the incorporation into the case-made of amendments he had suggested and served upon the opposing counsel within the time fixed by the order of the court; but, notwithstanding such diligence, if this case-made is permitted to stand, he would be deprived of his rights.

The alleged errors relied upon for reversal of the cause are such as can be reviewed only upon a case-made, and they can-

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not be presented by a transcript. It follows, therefore, that nothing is presented in this proceeding that can be reviewed, and this proceeding in error should be dismissed.

TURNER, C. J., and WILLIAMS, KANE and DUNN, JJ., concur.

DE NOYA v. HILL INV. CO.

No. 2207 Okla. Ter. Opinion Filed May 12, 1909.

Rehearing Denied October 1, 1912.

(127 Pac. 444.)

1. **INDIANS—Actions—Jurisdiction—"Reservation."** The following language of the act of Congress approved June 7, 1897, 30 St. at L. 71, c. 3: "And the justices of the peace and the probate courts in and for the territory of Oklahoma shall not have jurisdiction of any actions in civil cases against members of the Osage and Kansas Tribes of Indians, residing on their reservation in Oklahoma Territory, and the district court shall have exclusive jurisdiction in such actions, and at least two terms of such court shall be held in each year at Pawhuska, on said reservation, * * *" fixed the territorial jurisdiction of the district court at Pawhuska in a civil action in which a member of the Osage and Kansas Tribes of Indians is a party defendant as being coextensive with the territorial limits of the Osage reservation, and such language was not intended to require that the Indian defendant must reside upon lands the Indian title to which had not been extinguished.

2. **SAME.** The district court at Pawhuska, under said act of Congress (Act June 7, 1897, 30 St. at L. 71, c. 3), had jurisdiction of a civil case the defendant to which was a member of the Osage Tribe of Indians residing in the town of Pawhuska on a lot the Indian title to which had been extinguished.

3. **SAME—Contracts—Enforcement.** The provisions of the act of Congress approved March 3, 1901 (chapter 832, 31 St. at L. 1065), providing for the determination and adjustment of the accounts of Indian traders with the Osage Indians at the Osage agency, and for the payment of such accounts by the Secretary of the Interior out of the per capita amount of said Indians which had been collected as rent of pasture lands and accumulated interest other than the regular annuities of such Indians, afforded to such Indian traders a cumulative remedy for the collection of their accounts against the Osage Indians, and did not oust the district court at Pawhuska of jurisdiction in an action on a note by an assignee thereof executed by an Osage Indian to an Indian trader, instituted on the 6th day of March, 1907, where such note had

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not been presented by the payee therein, or by his assignee, to the Secretary of the Interior for adjustment, allowance, and payment under the provisions of said act.

(Syllabus by the Court.)

Kane, C. J., dissenting.

Error from District Court, Fourth District, of the Territory of Oklahoma, Sitting at Pawhuska, within and for the Osage Indian Reservation; Bayard T. Hainer, Judge.

Action by the Hill Investment Company against Clement De Noya. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action on a promissory note originally brought in the territorial district court of Pawhuska by defendant in error against plaintiff in error. The facts upon which it is based are substantially as follows:

For some time before the 29th day of September, 1900, one Johnson and one McLaughlin, doing business under the firm name of Johnson & McLaughlin, were licensed Indian traders on the Osage Indian reservation, with their principal place of business at the city of Pawhuska. On the 29th day of September, 1900, Clement De Noya, plaintiff in error, an Osage Indian, was indebted to said Johnson & McLaughlin on open account for goods, wares, and merchandise sold to him by said partnership in the sum of $447.88. On that date plaintiff in error executed and delivered to said partnership his promissory note due December 15, 1901, in settlement of his account. On or about June 1, 1901, Johnson & McLaughlin assigned and transferred said note to the Hill Investment Company, defendant in error, a corporation, of the state of Kansas. This action was instituted by defendant in error on the 6th day of March, 1907. At that time, and at the time of the trial of the case in the lower court, which occurred on the 29th day of May, 1907, plaintiff in error was a resident of the city of Pawhuska, and resided with his family upon property purchased from the United States government under the provisions of the Osage townsite bill (Act March 3, 1905, c. 1479, 33 St. at L. 1061). The trial in the lower court

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resulted in judgment in favor of the defendant in error and against plaintiff in error for the sum of $575.05. From this judgment plaintiff in error appealed by proceeding in error to the Supreme Court of the territory, where the proceeding was pending at the time of the admission of the state, and is now before us for final disposition under the terms of the Enabling Act (Act June 16, 1906, c. 3335, 34 St. at L. 267). Other facts important to the consideration of the proposition as involved in the appeal will be stated in the opinion.

Grinstead & Mason, for plaintiff in error.

Preston A. Shinn, for defendant in error.

HAYES, J. (after stating the facts as above). The first assignment of error urged goes to the jurisdiction of the trial court. Subsequent to the organization of the territorial government in the territory of Oklahoma and prior to June 7, 1897, the Osage Indian reservation was, by order of the Supreme Court of the territory, attached to Pawnee county for all judicial purposes. On the last-mentioned date an act of Congress was approved which contains the following provision:

"And the justices of the peace and the probate courts in and for the territory of Oklahoma shall not have jurisdiction of any action in civil cases against the members of the Osage and Kansas Tribes of Indians residing on their reservation in Oklahoma Territory, and the district court shall have exclusive jurisdiction in such actions and at least two terms of court shall be held in each year at Pawhuska in said reservation at such times as the Supreme Court of said territory shall fix and determine for the trial of both civil and criminal cases." (Act June 7, 1897, c. 3, 30 St. at L. 71.)

This statute conferred upon the district court at Pawhuska exclusive jurisdiction of civil cases in which a member of the Osage or Kansas Tribes of Indians who resided on the reservation was a defendant. By a provision of the General Indian Appropriation Bill, approved March 3, 1905, the creation of a townsite commission to be known as the Osage Townsite Commission was authorized, and said commission was directed to plat and survey into streets, alleys, lots, and blocks certain lands

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located in the Osage Indian reservation and to sell the same. The lands designated by the act included the town of Pawhuska. 33 St. at L. 1061. Under the provisions of this act, the townsite of Pawhuska was platted and surveyed, and the lots therein sold and title thereto conveyed to the purchasers. Plaintiff in error was one of such purchasers, and at the time of the institution and trial of this case in the court below resided on lots in the city of Pawhuska, the title to which he had acquired from the government under the provisions of said act. It is the contention of plaintiff in error that the conveyance by the government of the title to the lots comprising the townsite of Pawhuska to the purchasers thereof had the effect to destroy the character of the territory comprising the townsite as an Indian reservation, and that, after said event, the townsite of Pawhuska was no longer a part of the Osage and Kansas Indian reservation, and that an Osage Indian residing in said town was not within the terms and provisions of the act of 1897 conferring jurisdiction in certain cases upon the district court at Pawhuska. He lays much emphasis upon the fact that this act prescribed that the district court at Pawhuska should have jurisdiction of any action in civil cases against members of the Osage and Kansas Tribes of Indians "residing on their reservation," and contends that "reservation," as here used, is synonymous with "Indian country," and that, when the Indian title to any portion of the reservation became divested, such portion thereupon lost its character as Indian country, and that an Indian residing upon such portion thereby passed from out the jurisdiction of said court.

It is true that at the time of the approval of the Act of 1897 such Indian title to no portion of the lands embraced in the Osage reservation had been extinguished. Owing to this fact, at the time of the creation of the Pawhuska district court, it would have been impossible for the court to obtain jurisdiction of any civil action in which there could have been as party defendant an Osage Indian who resided upon lands in said reservation to which the Indian title had been extinguished. But such fact in our opinion was due to its physical impossibility, rather

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than to any legal inhibition contained in the act. Congress did not intend, by prescribing that the district court at Pawhuska should have exclusive jurisdiction in civil cases against members of the Osage and Kansas Tribes of Indians residing on their reservation, to require that such jurisdiction should be determined by the character of the title to the land upon which such Indian lived. The words "their reservation" were intended to fix the territorial jurisdiction of the court created. It had jurisdiction only in those cases in which a member of the Osage or Kansas Tribes of Indians was a defendant, and such Indian had to be a resident of the territory within the reservation. Courts are authorized, when the language of a statute is ambiguous or its meaning doubtful, to resort to the surrounding circumstances, the history of the times, and the mischiefs and defects the statute was intended to remedy, to ascertain the intention of the lawmaking body. *Smith v. Townsend*,, 148 U. S. 490, 13 Sup. Ct. 634, 37 L. Ed. 533.

By section 9 of the Organic Act (Act May 2, 1890, c. 182, 26 St. at L. 85), the territory of Oklahoma was first divided into three judicial districts. Later, by act of Congress, the number of districts was increased to five. Said section of the Organic Act also provided that all territory not embraced in organized counties should be, by order of the Supreme Court, attached to some organized county for judicial purposes. For some time prior to the approval of the act of 1897, the Osage Indian reservation had been, by order of the Supreme Court, attached to Pawnee county for judicial purposes. The result of this order was to give the justice, probate, and district courts of Pawnee county jurisdiction of all civil actions arising on said reservation. Members of said tribes of Indians whose places of residence were on the reservation were required to travel long distances to attend terms of court in which they were sued, and were compelled to litigate their rights away from their homes and among strange people. It was to remedy this condition that the act was passed. The purpose of the act is declared by Mr. Chief Justice Burford, in *Goodson v. United States*, 7 Okla. 117, 54 Pac. 423, as follows:

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"The only purpose of this act was to provide a court where the Indians could have their rights litigated on their own reservation without being compelled to go to a distant place among a strange people to attend court."

In the same case the court declared that this act made Pawnee county and said reservation one judicial subdivision, and declared that the jurisdiction of the Pawhuska district court as to civil actions was confined to all civil actions arising within said reservation in which a resident member of said tribes of Indians was a party defendant. The word "reservation," as used in the act, fixed the territorial jurisdiction of said court. It was intended by this language to designate the tract of land then embraced within said reservation as a district over which said court had jurisdiction as to Indian defendants in civil actions. It was not intended to require as a prerequisite to jurisdiction in civil actions that there must be, as defendant thereto, some member of said tribes residing upon land the Indian title to which had not been extinguished.

That part of the act which confers jurisdiction in civil cases in which a member of said tribes residing upon the reservation is a party defendant is no more mandatory and explicit than that portion of the act which requires that at least two terms of said court shall be held in each year at Pawhuska "on said reservation." If it was intended by Congress that the word "reservation" should be given the meaning for which plaintiff in error contends, when the town of Pawhuska was surveyed, platted, and sold, there no longer existed the place fixed in the act at which said court could be held, and plaintiff in error could have contended with equal show of reason that the court in the case at bar was held at a place which was unauthorized by law. That Congress intended no such meaning to be given to this language we think is evidenced by a provision in an act approved June 4, 1906, generally known as the "Recording Act," which made the Osage reservation a recording district, and contains the following language:

"And the deputy clerk of the district court at the town of Pawhuska on said reservation shall be *ex officio* register of deeds." (Act June 4, 1906, c. 2573, 34 St. at L. 208.)

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This act was passed subsequent to the Osage Townsite Act, providing for the sale of the townsite of Pawhuska and the extinguishment of the Indian title therein, and, if Congress had intended that the word "reservation" should be given the meaning that is contended for by plaintiff in error, it must have known when it passed this last act that no such officer described as deputy clerk of the court located at the town of Pawhuska on said reservation could exist when the services he was required to render would be demanded. If the construction for which plaintiff in error contends is correct, then an Osage Indian who lived in the townsite of Pawhuska would have been required to defend his action in the district court of Pawnee county, whereas his neighbor adjoining him, but just without the townsite of Pawhuska, would have the privilege of defending actions against him in a local court among his own people. Such construction would defeat in a great measure the very purpose of the act. Congress intended by the act to give to the Osage Indians a local court, and compel all civil actions brought against them to be brought in said court. Where the language of the statute is ambiguous, it should be so construed as to give effect to legislative intention. We have carefully examined the numerous authorities cited by plaintiff in error in support of his contention, but do not think they are in point.

The General Appropriation Act, approved March 3, 1901 (Act March 3, 1901, c. 832, 31 St. at L. 1065), contains the following paragraph:

"That the Secretary of the Interior is hereby authorized and directed to examine the accounts of Indian traders with the Osage Indians at the Osage agency, and to determine the sums equitably due to such traders from such Indians, and to adjust their accounts upon a basis of a fair profit upon the goods which have been sold by such traders to such Indians and when the amounts due as aforesaid shall have been determined and adjusted, the Secretary of the Interior is hereby authorized to pay, by a disbursing officer selected by the Secretary for that purpose, to the Osage Indians per capita the amount which has been collected as rent of pasture lands, and any accumulated interest other than their regular annuities which has not been heretofore paid to them: Provided, that when it shall appear to

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such disbursing officer, that any such Indian, either as an individual or the head of a family, is indebted to a trader or traders at such agency, as the same shall have been determined and adjusted, in an amount equal to or exceeding said per capita payment, such disbursing officer shall pay the per capita share due to said Indian as an individual or the head of a family to such trader or traders in discharge of, or to be applied upon, such indebtedness to such trader or traders. If such Indian as an individual or head of a family shall be indebted to more than one of such traders such payment of his per capita shall be paid to the traders in proportion to the amount of the respective sums due them, as determined and adjusted. If the per capita share of any such Indian as an individual or head of a family shall exceed his indebtedness to said trader or traders, then payment shall be made as aforesaid to such trader or traders of the amount due, as aforesaid, and the balance of such per capita payment shall be paid to the Indians. * * * Should the amount of per capita payment herein authorized and directed be insufficient to fully cancel and discharge the debts found to be due from such Indian to such traders as herein provided, the Secretary of the Interior is hereby authorized and directed to make further per capita payments to said Indians whenever and as often as future pasture moneys and accumulations of interest, other than regular annuities, shall amount to the sum of $100,000, the same to be paid and applied in the manner hereinbefore provided."

This act was passed subsequent to the execution of the note sued upon, but prior to its maturity and prior to the transfer of the same by Johnson & McLaughlin to defendant in error. Neither Johnson & McLaughlin nor defendant in error presented this note to the authorized agent of the Interior Department to have determined the sum equitably due thereon and for payment by the disbursing officer of the Interior Department as authorized by said act. It is contended by plaintiff in error that the failure of the owner of the note to present the same to the authorized officer of the Interior Department for allowance and payment now prevents the recovery of defendant in error thereon. This contention constitutes the only defense made by plaintiff in error against defendant in error's right to recover in this action. The payees in the note were licensed traders in the Osage Indian reservation, and the sale of the merchandise made by them to the plaintiff in error for which he gave the note sued upon was made

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under authority of a license from the government. Section 2129 of the Revised Statutes of the United States provides that the Commissioner of Indian Affairs shall have sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper governing such agents and regulating the trade with the members of the tribes. It is not contended that the payees in the note in obtaining said note from plaintiff in error in settlement of his account for goods, wares, and merchandise purchased from them in any way violated any of the rules of the department governing them as Indian traders. On the other hand, rule 542 of the office of the Indian Commissioner regulating trading with the Indian tribes, introduced in evidence at the trial, provides as follows:

"If credit is given Indians by a trader, he must take the risk of his action. No assistance in the collection of alleged claims will be given him by the agent. But whenever any Indians obtain goods of licensed traders on credit, they are expected to pay for the same promptly in the manner and at the time agreed upon."

Prior to the passage of the General Indian Appropriation Act of 1901, no remedy was afforded to Indian traders in the Osage Indian reservation by which they could subject the funds held in trust by the government of the United States for the members of said tribe to the payment of accounts or indebtedness due them by the members of the tribe, nor under the rules of the Interior Department would said department lend its assistance to the Indian traders in procuring the payment of such funds upon said indebtedness. The only remedy afforded to Indian traders against delinquent customers who refused payment of their indebtedness was to resort to the courts and obtain judgment and enforce payment of the same against such property as the Indian might have (other than the property held in trust by the United States) that was subject to execution. Under the provisions of the act of 1897, such actions could be brought in the district court at Pawhuska, as the action in the case at bar was brought. But it is the contention of plaintiff in error that the foregoing provision of the act of March 3, 1901, afforded to defendant in error an exclusive remedy for the collection of its

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claim, and that said act repealed the right of defendant in error to resort to said tribunal for an adjudication and enforcement of its claim.

Much has been said in the briefs of the power of Congress to regulate trade and intercourse with the Indian tribes and of the lack of power of Congress to pass laws that impair lawful private contracts. We think, however, that the second assignment of error also presents only a question of statutory construction, to wit, Did the act of 1901 furnish to the licensed traders with the Osage Indians a cumulative remedy for the collection of debts due them by such Indians, or did it afford an exclusive remedy? If the remedy was exclusive, then said act had the effect to oust the jurisdiction of the territorial district court at Pawhuska in actions to enforce the payment of such debts. But the presumption is against an intention of the lawmaking body to take away the jurisdiction of a superior court. 26 Am. & Eng. Ency. of Law, p. 645. And a statute that merely gives an affirmative jurisdiction to one court will not be construed as ousting a jurisdiction existing in another court when such jurisdiction is not taken away by express terms or by necessary implication. An existing remedy for an existing right is not destroyed by a new remedy, for an existing right is not destroyed by a new remedy for the same right where a repeal of the existing remedy is not made by express words or by necessary implication. The new remedy is cumulative. These rules of statutory construction are well established, and are fundamental. The provisions of the act of 1901 quoted above contain no express words ousting the jurisdiction of the district court at Pawhuska in actions like the one at bar. The Secretary of the Interior is authorized by said act to make payments out of the trust funds belonging to the Osage Indians on the indebtedness of such Indians to licensed traders on the reservation. He is not authorized, however, to pay to such traders on the indebtedness of such Indians more than any such Indian debtor's individual share of said trust fund or the share to which he is entitled as the head of a family. The statute further requires that any creditor of such Indian who desires to have applied the pro-

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portionate share of the fund to which such Indian is entitled to the payment of debts which such trader holds against the Indian must submit his claim to the Secretary of the Interior to adjust the same upon an equitable basis. This fund, under the statutes and under the rules of the United States Indian Office, had never been before available to the creditors of the Indians for the purpose of applying the sum to which such Indian debtor was entitled to the payment of his debts. The Indian trader could go into the courts and obtain judgment against such Indian debtor, and could enforce the judgment by execution on property owned by the Indian debtor other than the trust property held for the tribe by the United States government. The act in question gives the Indian trader a new remedy, a new means of obtaining payment of his accounts, but it contains no provision prohibiting the Indian from paying such debts out of other funds and property he may possess than the trust fund held by the United States government, nor does it by express words or by implication prohibit the creditor from collecting such debts by other means and from other property than that provided for in the act. Such provision of the act was primarily for the benefit of the Indian traders to enable them to enforce the application of the Indian's annuities to the payment of debts that he owed them. The purpose of conferring upon the Secretary of the Interior the power to adjudicate the claims of such creditors was not to make him a court to try and adjudicate all rights between the Indians and the traders, but was to enable him to protect the Indians against false and fraudulent claims of the traders, where payment was made out of the trust fund. The act further provided that, in order that any trader might avail himself of the opportunity of having his debts paid out of said fund, he must voluntarily surrender such portion of the profits he had charged for the goods, wares, and merchandise he had sold the debtor as the Secretary of the Interior should find unfair. The funds appropriated by the United States government for the payment of such debts by the Secretary of the Interior were out of rents collected from the pasture lands belonging to said tribe and from the accumulated interest on the trust funds of the tribe

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other than their regular annuities, which had not theretofore been paid to them. Failure of defendant in error to present his note and collect the same out of this fund was in no way prejudicial to plaintiff in error. Plaintiff in error may have had other creditors. If he did, they could have presented their claims to the Secretary of the Interior and had them paid out of such funds, and the failure of defendant in error to present its claim resulted only in leaving more funds to be applied to the claims of other creditors. And, if any portion of said fund was left after the payment of claims of creditors who presented the same, the remainder, as by the statute provided, was to be paid to the plaintiff in error.

The note sued upon contains a clause providing for the collection of attorney's fees if suit should be instituted to enforce its collection, and it is therefore nonnegotiable. *Randolph v. Hudson,* 12 Okla. 516, 74 Pac. 946; *Cotton v. John Deer Plow Co.,* 14 Okla. 605, 78 Pac. 321; *Sullins v. Farmers' Exchange Bank,* 17 Okla. 419, 87 Pac. 857, 10 L. R. A. (N. S.) 839; *Dickerson v. Higgins et al.,* 15 Okla. 588, 82 Pac. 649; *Clevenger v. Lewis,* 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56.

This note in the hands of defendant in error is subject to all equities it would have been subject to in the hands of the original payees, but plaintiff in error has set up no equities in his defense, and has made no complaint against the right of defendant to recover other than its leniency.

Finding no error in the record, the judgment of the trial court is affirmed.

WILLIAMS, TURNER, and DUNN, JJ., concur; KANE, C. J., dissenting.

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GAY *et al.* v. HICKS *et al.*

No. 2828. Opinion Filed June 25, 1912.

Publication Withheld Until September Term, 1912.

(124 Pac. 1077.)

WATERS AND WATER COURSES—Injunction—Irrigation System—Parties—Misjoinder. A petition for an injunction, the purpose of which is to restrain action by the state engineer and an applicant for water rights on a certain stream until a hydrographic survey could be made and the rights of all claimants determined, and which shows that petitioners had previous to the date of the filing of the application duly and lawfully appropriated to a beneficial use all of the waters of the said stream, but that no hydrographic survey nor judicial determination of their rights had ever been made, and which pleads that to allow the prayer of the applicant would be to destroy a long established irrigation system erected at a cost of $50,000, and that the applicant was not in good faith seeking such water rights for the purpose of putting the water applied for to a beneficial use, but merely for speculative purposes, states a cause of action; nor is the said petition vulnerable to a charge of either misjoinder of parties or improper joinder of causes of action because there is joined therein all of the parties claiming a right in and to the water along with the state engineer, and the relief asked against the latter is different from that demanded against his codefendant, the purpose shown being to hold the entire matter in **statu quo** until a survey and adjudication could be made, as required by the statute.

(Syllabus by the Court.)

Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Sanford Gay and others against H. L. Hicks and Ben Hennessey. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

S. B. Garrett and *W. C. Austin,* for plaintiffs in error.

O. T. Smith and *Joel M. Sandlin,* for defendant in error Hicks.

Chas. West, Atty. Gen. (*Chas. L. Moore,* Asst. Atty. Gen., of counsel), for defendant in error Hennessey.

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DUNN, J. This case presents error from the district court of Jackson county brought by Sanford Gay and others as co-plaintiffs against H. L. Hicks and Ben Hennessey, the latter of whom is secretary of the Board of Agriculture and *ex officio* State Engineer. The action is brought to determine the respective rights of the parties to the suit, except the said State Engineer, in and to the waters of Turkey Creek, in Jackson county, and for an injunction restraining defendants in error from conducting certain proceedings, the purpose of which was to grant to the said H. L. Hicks a right or permit to the use of the waters of said stream in disregard as it is claimed of the rights of plaintiffs in and to the said water, based upon a claim of prior appropriation and beneficial use thereof. The petition of plaintiffs sets forth in effect that they were owners of certain land adjacent to said creek in the said county, a considerable portion of which was irrigable; that no hydrographic survey of the stream system had at any time been made, nor had the rights of the owners of the said land in and to the waters of the stream ever been adjudicated or determined. It then averred that the said defendant Hicks had caused notice to be published and had filed with the defendant Hennessey his application to appropriate seventeen cubic feet per second of the water of said stream, both surface and underflow, for irrigation purposes; that June 5, 1911, was fixed as the date when the application of the said defendant Hicks would be taken up and considered at the office of the said State Engineer in Oklahoma City. It was set forth that the plaintiffs had been using waters of the said creek for domestic, stock-raising, and irrigation purposes, beneficial in their character, for a long time prior to the filing of the application by the said defendant Hicks, and that they so desired to continue and use the same and extend their use for irrigation and other purposes; that the said defendant Hicks was attempting to appropriate the previously appropriated water which, if permitted, would greatly damage plaintiffs, for which they had no adequate remedy at law, and that the proposed investigation and action to be taken before the said State Engineer would result in a multiplicity of suits, and, should the application be al-

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lowed, would permit a cloud to be placed upon the title to plaintiffs' lands, and greatly injure their property rights. It is further alleged that the plan proposed by the said defendant Hicks was impracticable, and that his purposes were not in good faith to utilize the water which was being put to beneficial uses by plaintiffs, but that he intended to speculate upon the increase in the value of land to which he was seeking to have the same applied. It is further set forth in the petition that in the year 1895 W. L. Fullerton, then being in the possession of certain lands on the said creek, constructed a dam across the same, and appropriated the water thereof for irrigation purposes under the laws of the state of Texas, while the said creek was in Greer county, which was at that time within the jurisdiction of that state; that he had also under the laws of the territory and state of Oklahoma duly filed his maps and plats, together with the location of his dam, head-gate, and main ditch, in the office of the register of deeds of Greer county, and thereby appropriated the same for irrigation purposes; that he had constructed dams and ditches at an estimated expense of $50,000, and that there is no unappropriated flow of waters of the said creek at the point designated by the defendant Hicks, but that all of the said flow has been fully appropriated and applied to beneficial use; that, if the hearing called is had, the result thereof will be a great amount of useless litigation for the purpose of determining the rights of owners of the land, including these plaintiffs who are interested in and using the waters of the said creek. The prayer of the petitioners was that a temporary injunction be granted against the defendants restraining the defendant Ben Hennessey, State Engineer, from granting defendant Hicks the rights asked for in said petition, until such time as the rights of plaintiffs might be determined and declared as provided by law; that the court order and direct the State Engineer to make and furnish a complete hydrographic survey of the said Turkey Creek in order to determine the rights of plaintiffs and all others whose rights might become affected, and that upon a final hearing the defendants be permanently enjoined from interfering with the rights of plaintiffs, that they be prevented from appropriating

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more of the said water than is shown to be due them, and that the rights of all parties in and to the said waters be declared as provided by law.

The foregoing sets forth substantially what are deemed to be the effect of the material averments of the petition and the relief asked. After the filing of the same, it was presented to the judge of the district court, who issued a temporary injunction, which, on the motion of defendants, was dissolved, but was afterward kept in force by a supersedeas bond, and the cause has been lodged in this court for review.

Two assignments of error are presented by plaintiffs to this court, the first of which alleges that the court erred in dissolving the temporary injunction for the reason that, under the averments of the petition, the flow of the stream does not exceed the quantity of water for which the said defendant Hicks has made application, and that plaintiffs are the owners of land adjacent to, on, and along said creek, and one of plaintiffs had long prior to said application and notice built a dam across said creek and an irrigation ditch, and had appropriated to beneficial use all of the natural flow of the said creek and the stream of water thereof in accordance with the laws of Oklahoma, and had been for a long time past, and was so using the same at the date of the filing of the said application, and the giving of the said notice; that plaintiffs have brought their action against the defendants to have their respective water rights adjudicated, and that there was not then and never had there been made a hydrographic survey of the water of the said stream, and that this was necessary before any award allotting water could be made by the said State Engineer. The second assignment sets out more fully the procedure taken and the acts done by Mr. Fullerton, one of the plaintiffs, to establish his irrigation system and to appropriate to a beneficial use the waters of said creek, and urges that, under the application of the said Hicks, no portion of the said waters could be awarded to him unless the said irrigation plant established at a cost of $50,000 should be destroyed. Counsel for defendant Hicks and the Attorney General on the part of the State Engineer have filed briefs in which a number of reasons are pre-

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sented and argued as grounds for sustaining the action of the trial court, but they all finally resolve themselves into substantially two propositions: First, that the grounds set forth in the petition do not, under the statutes relating to the law of irrigation, state facts sufficient to justify the court in enjoining the applicant and the State Engineer from proceeding prior to a judicial determination of the rights of the different parties in and to the waters of the said stream; and, second, that there was an improper joinder of parties and causes of action.

The statutes, and those portions thereof relating to this subject, and necessary to be here considered, are as follows:

Section 3915, Comp. Laws 1909, provides:

"The unappropriated waters of the ordinary flow or underflow of every running stream or flowing river, and the storm or rain waters of every river or natural stream, canon, ravine, depression or watershed within those portions of the state of Oklahoma in which by reason of the insufficient rainfall, or by reason of the irregularity of the rainfall, irrigation is beneficial for agricultural purposes, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes and in the manner as hereinafter provided."

Section 3923, *Id.*, provides:

"Beneficial use shall be the basis, the measure, and the limit of the right to the use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands owned by the person or persons claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to the passage of this act, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after the passage of this act shall relate back to the date of receipt of an application therefor in the office of the State Engineer, subject to compliance with the provisions of this act, and the rules and regulations established thereunder."

Section 3932, *Id.*, provides:

"The State Engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state beginning with those most used for irrigation,

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obtaining and recording all available data for the determination, development and adjudication of the water supply of the state. * * *"

Section 3933, *Id.*, provides:

"Upon the completion of such hydrographic survey of any stream system, the State Engineer shall deliver a copy thereof together with copies of all data necessary for the determination of all rights to the use of the waters of such system, to the Attorney General who shall within sixty days thereafter enter suit on behalf of the state for the determination of all rights to the use of such water, and shall diligently prosecute the same to a final adjudication: Provided, that if a suit for the adjudication of such rights shall have been begun by private parties, the Attorney General shall not be required to bring suit; Provided, however, that the Attorney General shall intervene in any suit for the adjudication of rights to the use of water on behalf of the state if notified by the State Engineer that in his opinion the public interest requires such action."

Section 3934, *Id.*, provides:

"In any suit for the determination of a right to the use of the waters of any stream system, all parties who claim the right to use such waters shall be made parties. When any such suit has been filed, the court shall by its order, duly entered, direct the State Engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determination of the rights involved. * * *"

Section 3936, *Id.*, provides:

"Upon the adjudication of the rights of the use of the waters of a stream system, two or more certified copies of the decree shall be prepared by the clerk of the court, at the cost of the parties, one copy shall be filed in the office of the State Engineer and the other in the office of the register of deeds of the county or counties in which such stream system is situated. Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority."

Section 3937, *Id.*, provides:

"Any person hereafter intending to acquire the right to the beneficial use of any water, shall, before commencing any construction for such purposes, or before taking the same from

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any constructed works, make an application to the State Engineer for a permit to appropriate in the form required by the rules and regulations established by him. Such rules and regulations shall, in addition to providing the form and manner of preparing and presenting the application, require the applicant to state all the data necessary for the proper description and limitation of the right applied for, as to the amount of water and periods of annual use, together with such information, maps, field notes, plans and specifications as may be necessary to show the method and practicability of the construction and the ability of the applicant to complete the same. All such maps, field notes, plans and specifications shall be made from actual surveys and measurements, and shall be retained in the office of the State Engineer after the approval of the application. The State Engineer may require additional information not provided for in the general rules and regulations, in cases involving the diversion of 500 cubic feet of water per second, or more, or the construction of a dam more than ten feet high from the foundation. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess, and shall be held as trustees of such right for the parties applying the water to a beneficial use; and shall be required to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be."

Section 3939, *Id.*, provides:

"Upon the filing of an application which complies with the provisions of this act and the rules and regulations established thereunder, the State Engineer shall instruct the applicant to publish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for four consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them, the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time when the application will be taken up by the State Engineer for consideration. Proof of publication as required, shall be filed with the State Engineer within sixty days from the date of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules and regulations applicable thereto, within the time required, the application shall thereafter be treated as an original application filed on the date of receipt of proofs of publication in proper form."

Section 3940, *Id.*, provides:

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"Upon the receipt of the proofs of publication, the State Engineer shall determine from the evidence presented by the parties interested, from such surveys of the water supply as may be available, and from the records, whether there is unappropriated water available for the benefit of the applicant. If so, he shall indorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied to a beneficial use, not exceeding four years in addition thereto."

Section 3941 *Id.*, provides:

"If, in the opinion of the State Engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or to order the publication of notice thereof, if, in his opinion, the approval thereof would be contrary to the public interest. Any applicant may appeal from such decision of the State Engineer, or from any other decision by him which denies a substantial right, within sixty days from the date thereof, to the district court of the county in which the proposed place of diversion or storage is situated. In the absence of such appeal, the decision of the State Engineer shall be final."

The averments of the petition, as is seen, disclose that plaintiffs have devoted to a beneficial use all of the waters of the said creek, and this prior to the time the said defendant Hicks made his application. From the statute it is seen that the diligent prosecution by plaintiffs to the completion of their system of irrigation as established for the purpose of applying the water to a beneficial use related back to the initiation of their claim, and gave exclusive right to the use of the water as against all subsequent applicants. The authority of the State Engineer is administrative, and not judicial; and hence he has no power to impair vested rights, nor would his decision as to what the existing rights are be conclusive. Any action taken by him would be open to collateral attack in court by injunction or other process, as would also the action of the defendant Hicks, should he be authorized to take water from the said stream. 2 Weil, Water

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Rights (3d Ed.) secs. 1193, 1194; *Willey et al. v. Decker et al.*, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939, and cases therein cited. Thus appears the inherent weakness and indecisive character of any right or privilege granted by the State Engineer prior to judicial action, and the provisions of sections 3933 and 3934, *supra*, of the statutes are intended in their scope to fix finally and definitely the rights of all interested parties in and to the waters of any stream in question; the purpose of these statutes being to secure a decree which shall be conclusive and final and not subject to collateral attack. 2 Wiel on Water Rights, sec. 1233; *Farmers' Union Ditch Co. et al. v. Rio Grande Canal Co. et al.*, 37 Colo. 512, 86 Pac. 1042.

In *Louden Irrigating Canal Co. et al. v. Handy Ditch Co. et al.*, 22 Colo. 102, 43 Pac. 535, it is said:

"Some idea of the expense and labor necessary to take the evidence and formulate a decree in some of our water districts may be gathered from the statement that, in some districts, not only months, but years have been consumed in doing the necessary work incident thereto."

From the foregoing it will be seen that a protracted investigation and litigation involving many parties, and not only one action, but many, is almost, if not quite, certain to result from an order made by the State Engineer granting the permit prayed, and that at the conclusion thereof and the making of the order no final determination of the controversy would have been attained.

In this connection it is also to be noted that under section 3941, Comp. Laws 1909, *supra*, which provides for an appeal, this remedy, it seems, is open to the applicant only, and not to the protestant whose rights are likely to be invaded, so that, as a result of the procedure sought to be taken, should the award be made as against these plaintiffs at the instance of the defendant Hicks, the rights of none of the parties would be finally established, and the defendant would have naught as a result thereof that he did not enjoy before the hearing by the mere filing of his application, and a necessity for an adjudication of the rights of all in the district court would still exist, and the long road over which they would have previously traveled would again be

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before them. It is said in the case of *Hallet v. Carpenter et al.*, 37 Colo. 30, 86 Pac. 317:

"It is contrary to the principles of equity and good sense to compel parties to engage in two suits at law or equity when the whole matter can be determined in one. Equity as well as good conscience abhors a multiplicity of actions."

See, also, *Maloney et al. v. King et al.*, 30 Mont. 414, 76 Pac. 939. An investigation of the authorities passing upon questions of water rights under the common law as well as law of usage and custom, which has grown up in the western states, and the statutes passed by the federal and state governments, discloses that the determination of water rights has been fraught with much perplexity and difficulty. In so far as it at present seems possible, the statutes of this state have a strong tendency to simplify the whole matter by providing in the first instance (section 3932) for the State Engineer to make a hydrographic survey and investigation of each stream system in the state, beginning with those most used for irrigation, and then providing that, as rapidly as such survey is made of any system, a copy of the same, accompanied by all data necessary for the determination of all rights (section 3933), shall be delivered to the Attorney General, who is required within 60 days thereafter to enter suit on behalf of the state for the determination of the rights in and to the water. Its importance is deemed such that he is required by positive mandate to diligently prosecute the same to a final adjudication. That private parties as in the present instance have the right to begin suit is also provided, with authority in the Attorney General on the opinion of the State Engineer to intervene. Section 3934, *Id.*, provides for the making of parties in the determination of a right to use waters of any stream all who claim any interest therein, and, on the filing of any such suit, it is made the duty of the court to enter an order directing the State Engineer to furnish a complete hydrographic survey of the stream system, in order to obtain all data necessary to the determination of the rights involved, and the costs of this proceeding are made charges against each of the private parties involved. Herein, with jurisdiction of the whole subject, with all parties before it and with all knowledge available, is adjudicated

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in court to a final determination the rights of all interested. Herein is rendered a decree which definitely fixes these rights and upon which all parties may act with certainty for the future. A copy of the decree thus made is ordered to be filed in the office of the State Engineer and in the office of the register of deeds of the county where the stream system is situated, and it is provided (section 3936) that the said decree "shall in every case declare as to the water right adjudged to each party, the priority, amount, purpose, place of use, and as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority." It is manifestly intended that this procedure should take place before the procedure provided for in the succeeding sections. This purpose is gleaned, not only from the ineffectiveness of any permits or rights which might be asserted upon any order made by the State Engineer, but also from a mature consideration and reading of the statute as a whole. Section 3937, *Id.*, which provides for the application to the State Engineer by any person intending to acquire the right to the beneficial use of any water, succeeds those provisions which provide for the hydrographic survey, the filing of the same with the Attorney General, and action thereon by him, as well as actions by private parties based upon the hydrographic survey made by the State Engineer on the order of the court, and also the provision that a copy of the decree showing the rights already vested should be filed in the office of the State Engineer; thereby, in our judgment, showing a manifest intention on the part of the Legislature to have these things precede the futile and vexatious act of the State Engineer on hearings before him, granting permits without them, the manifest effect of which would be to cloud titles, and afford a fruitful source of litigation. After all of the provisions of the statute providing for the determination of the rights of parties and the filing of evidence thereof with the State Engineer, section 3937, *Id.*, follows, and provides for the making of applications before the State Engineer for permits to appropriate water. Publication thereof is required (section 3939, *Id.*) and section 3940, *Id.*,

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provides for a hearing, and requires the State Engineer to determine from the evidence presented by the parties interested, from the surveys of the water supply, and from the records whether there is unappropriated water available for the benefit of the applicant. In our judgment the records referred to relate at least to the decrees which fixed finally the rights of other users of the water of the stream in question. Until these rights are determined and finally adjudicated, it is manifest that a subsequent applicant could get no enforceable interest in the stream. The question of the amount of appropriated water would and could be determined finally only in the judicial proceeding. Section 3941, *Id.*, provides that, if in the opinion of the State Engineer there is no unappropriated water available, he shall reject such application, and, in order for him to know this, it is, as we have seen, essential that it first be judicially determined. So that, in our judgment, in order that there may be an orderly procedure for the determination of the rights involved, it is necessary that a survey and adjudication precede action by the State Engineer further than accepting the application to fix priority, and a petition setting up facts shown in the one filed herein seeking to restrain an applicant for water rights and the State Engineer until the question of priorities and the quantity of water beneficially applied has been judicially determined, is not vulnerable to a general demurrer.

Nor in our judgment is there any improper joinder of parties. Section 3933, *Id.*, as we have seen, provides for a suit for the adjudication of these rights by private parties, which relieves the Attorney General of bringing suit. Section 3934, *Id.*, provides that in any suit (which would include an action brought by the Attorney General or by private parties) all parties who claim the right to use such water shall be made parties. This in our judgment determines the question of parties. Until all of the parties who have rights or who claim rights in and to the use of the water of this stream are before the court, it can render no decree which will affect them, and on the remission of this case to the trial court, should it develop that there are other parties interested in this litigation, and who are not parties to

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this suit, they may be made so to the end that the decree finally entered may be final and determine the extent of the interests of all. And to hold the matter *in statu quo* until this could be done it was proper to stay action by the State Engineer and the defendant Hicks.

The order of the court dissolving the temporary injunction is accordingly reversed, and the case remanded to the trial court, with directions to proceed in accordance with the mandates of the statutes as the same are construed in this opinion.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

GAY *et al.* v. WALLACE *et al.*

No. 2827. Opinion Filed June 25, 1912.

Publication Withheld Until September Term, 1912.

(124 Pac. 1082.)

Error from District Court, Jackson County;

Frank Mathews, Judge.

Action by Sanford Gay and others against Reid Wallace and Ben Hennessey. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

S. B. Garrett and *W. C. Austin,* for plaintiffs in error.

O. T. Smith and *Joel M. Sandlin,* for defendant in error Wallace.

Charles West, Atty. Gen. (*Charles L. Moore,* Asst. Atty. Gen., of counsel), for defendant in error Hennessey.

DUNN, J. The issues in this case are identical with the issues in the case of *Gay et al. v. Hicks et al., ante,* 124 Pac. 1077. Under stipulation of counsel, the same briefs were filed in both cases, and the judgment in this case follows the judg-

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ment in that one. The judgment of the trial court is accordingly reversed, and the cause remanded to the trial court, with directions to proceed in accordance with the mandates of the statutes as the same are construed in this opinion.

TURNER, C. J., and HAYES and KANE, JJ., concur; WILLIAMS, J., absent, and not participating.

CHICKASHA LIGHT, HEAT & POWER CO. v. BEZDICHECK.

No. 2874. Opinion Filed May 14, 1912.

Rehearing Denied October 1, 1912.

(126 Pac. 821.)

APPEAL AND ERROR—Necessary Parties—Dismissal. Same as that in **Humphrey et al. v. Hunt**, 9 Okla. 196, 59 Pac. 971.

(Syllabus by the Court.)

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

Action by Frank Bezdicheck against the Chickasha Light, Heat & Power Company and Don McGuire. Judgment for plaintiff against the Light, Heat & Power Company, and it appeals. Dismissed.

Everest, Smith & Campbell and *Bond & Melton*, for plaintiff in error.

Barefoot & Carmichael and *A. C. Cruce*, for defendant in error.

WILLIAMS, J. On August 27, 1910, the defendant in error, Frank Bezdicheck, as plaintiff, sued the plaintiff in error, the Chickasha Light, Heat & Power Company, and also Don McGuire, as defendants, in the district court of Grady county. After issue was joined a trial was had on January 27, 1911, be-

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fore a jury, which, on January 28, 1911, returned the following verdict:

"We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiff and fix the amount of his recovery at $15,200 and against the defendant Light, Heat & Power Co., fifteen thousand and two hundred dollars."

On the 31st day of January, 1911, judgment was rendered on said verdict as follows:

"It is therefore considered, ordered, adjudged, and decreed by the court that said verdict is a verdict in favor of the defendant Don McGuire, and that the plaintiff have and take nothing in this action against said defendant Don McGuire, but that said defendant Don McGuire have and recover of and from said plaintiff all his costs in this behalf expended, for which let execution issue."

On January 27, 1911, the following judgment was also entered as to the defendant the Chickasha Light, Heat & Power Company:

"It is therefore considered, ordered, adjudged, and decreed that the plaintiff, Frank Bezdicheck, do have and recover of and from the defendant Chickasha Light, Heat & Power Company the sum of fifteen thousand two hundred dollars ($15,200.00), together with interest at the rate of six per cent. per annum from this date until paid, and all costs of this suit."

This identical question was passed on by this court in *K. C., M. & O. Ry. Co. v. Williams, ante,* 124 Pac. 63, on March 12, 1912, and the proceeding in error was dismissed on account of want of necessary parties plaintiff. The case principally relied on in dismissing said proceeding in error is that of *Humphrey et al. v. Hunt,* 9 Okla. 196, 59 Pac. 971. In the opinion the court said:

"This action was commenced in the district court of Kingfisher county by Maggie Hunt against Lewis Humphrey, Grant Humphrey, Joseph C. Post, Lewis Wolf, E. A. Davis, J. W. Watkins, Joseph H. Lowery, C. P. Blakely, and Fred Belt for $10,000 damages for the death of her husband, which plaintiff alleges was caused by the falling of a defective cotton gin building upon her husband, while the deceased was in the employ of the above-named defendants. A change of venue was granted, and the case removed to Grant county, where a trial by jury was had which resulted in a verdict and judgment for plaintiff for

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$2,100 against Lewis Humphrey, Grant Humphrey, Lewis Wolf, E. A. Davis, J. W. Watkins, Joseph H. Lowery, and C. P. Blakely, and a verdict and judgment in favor of Fred Belt and against plaintiff. No verdict was rendered for or against J. C. Post. The defendants, against whom the judgment was rendered, appealed therefrom to this court. The plaintiff Maggie Hunt was the only party served with the case-made, and she has filed a motion to dismiss the appeal for the reason that all of the parties who would be affected by a reversal of the judgment were not served with the case-made, and are not made parties to the appeal. It is clear that Belt might be affected by a reversal of the judgment by which he was discharged from all liability to the plaintiff, and, if it should be vacated and set aside and a new trial granted, he would have to defend in another trial and take the chances of a verdict being rendered against him. If he had been made a party, he could urge any reason he may have why the judgment should stand; but from this record the law presumes that he has no knowledge of the pendency of this appeal, and he cannot, therefore, be expected to enter an appearance. In the case of *Gillette et al. v. Murphy et al.*, 7 Okla. 91, 54 Pac. 413, it was held, by implication, that if a party can, by a reversal or modification of the judgment appealed from, be in any way affected, he is a necessary party. This view is also supported by the following cases: *Norton v. Wood* [55 Kan. 559] 40 Pac. 911; *Bain v. Conn. Mut. Ins. Co.* [3 Kan. App. 346] 40 Pac. 817; *Denebiem et al. v. Wingate, Stone, Wells Mercantile Co.*, 51 Pac. 909; *Hyde Park Ins. Co. v. First Nat. Bank of Atchison* [56 Kan. 49] 42 Pac. 321; *Casey v. Oakes et al.* [13 Wash. 38] 42 Pac. 621; *McPherson v. Storch et al.* [49 Kan. 313] 30 Pac. 480; *Jackson County v. Bloomer* [28 Ore. 110] 41 Pac. 930; *McNeal v. Gossard Ins. Co. et al.*, 54 Pac. 1040; *Eaton et al. v. Mendenhall* [Kan.] 44 Pac. 683; *Bullock v. Taylor et al.* [112 Cal. 147] 44 Pac. 547. It might be argued that, inasmuch as Mrs. Hunt failed to appeal from the judgment in favor of Belt, it became final as to him. This, however, cannot be true. The plaintiff submitted the entire matter to the jury, and while she failed to recover a judgment against all of the parties whom she sued, she was satisfied with it because she failed to appeal. But the judgment was a joint judgment, and all of the parties affected thereby must be made parties and given an opportunity to be heard, or the judgment will not be disturbed. * * * In this case all of the necessary parties are not before this court. For the reasons herein stated, the appeal is hereby dismissed, at the cost of the appellant, and the case remanded to the lower court,

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with direction that the judgment rendered by the district court be carried into execution."

If the case of *Humphrey et al. v. Hunt, supra,* is adhered to, this appeal must be dismissed. This case was decided by the Supreme Court of the territory of Oklahoma on November 7, 1899.

"A well-settled rule of practice, which has been silently acquiesced in, will not be set aside where it would probably cause great inconvenience and confusion in the practice, and where it can easily be changed by the Legislature, if there is any necessity therefor." (*Palmer v. Harris,* 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822.)

Adjudications as to what are necessary parties in such cases having been made by the Supreme Court of the territory of Oklahoma, which have been followed and acquiesced in without dissent by the courts since that time, the rule of certainty in procedure prevents our adopting a contrary decision. This rule should be changed, but it must be done by legislative action. In *Richardson et vir v. Beidleman et al., ante,* 126 Pac. 816, this court said:

"The decision in *Barnes v. Lynch,* 9 Okla. 11 [59 Pac. 995], being made in 1899, we do not feel inclined to re-examine the same to determine whether it follows correctly the Kansas cases; for from that day until this neither the Supreme Court of the territory of Oklahoma nor this court has made any holding that militates against the same, so far as the facts in the record justified a holding, nor has there been any legislative action contrary thereto."

Under such rule, this proceeding in error must be dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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CITIZENS' NAT. BANK v. WARNER & JACKSON.

No. 1273. Opinion Filed September 11, 1912.

Rehearing Denied October 22, 1912.

(127 Pac. 388.)

BILLS AND NOTES—Action on Note—Denial of Validity. Where, in a suit against the maker on two promissory notes commenced by the indorsee of the payee in what was then Indian Territory prior to the admission of the state into the Union, defendant pleaded, in effect, the general issue, but failed to deny their genuineness by affidavit before the trial began, pursuant to Mansf. Dig., sec. 2872 (Ind. T. Ann. St. 1899, sec. 1987), **held**, that the court did not err in rejecting defendant's offer to prove that A., the president of the defendant bank, had no authority to sign its name thereto. **Held**, further, that the court did not err in rejecting defendant's offer to prove that plaintiff paid no consideration for the notes, but had obtained their indorsement from the payee therein by paying off two certain mortgage notes originally made payable to said A. and by him indorsed to the payee as collateral to secure the payment of said notes.

(Syllabus by the Court.)

Error from District Court, Atoka County;
A. T. West, Judge.

Action by Warner & Jackson against the Citizens' National Bank. Judgment for plaintiffs, and defendant bring error. Affirmed.

J. M. Humphreys and *Ralls Bros.*, for plaintiff in error.

D. H. Linebaugh, Arthur G. Moseley, and *Victor J. Miller,* for defendants in error.

TURNER, C. J. On December 8, 1906, Fred W. Warner and J. A. Jackson, partners doing business as Warner & Jackson, defendants in error, sued the Citizens' National Bank of Atoka, plaintiff in error, in the United States Court for the Indian Territory, Central District, sitting at Atoka. The complaint, after stating the residence of the respective parties, and that the defendant was engaged in the banking business at Atoka,

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further alleged that on March 20, 1906, the defendant, for value, executed and delivered to the Missouri-Lincoln Trust Company, of St. Louis, Mo., or order, its two certain promissory notes, due October 1, 1906, and November 1, 1906, respectively, the first being for $4,000, with interest, and the second for $2,500, with interest; that before maturity said notes for value received by the Missouri-Lincoln Trust Company, the payee therein, were duly indorsed and delivered to plaintiffs, "whereby they became in all respects the property of said plaintiffs"; that said notes were due and unpaid after presentation and demand of payment. After filing copies of said notes as a part of their complaint, plaintiffs prayed judgment thereon in all for $7,500. After demurrer filed and overruled defendant answered, in effect, a general denial, verified by one of its attorneys. There was trial to a jury and judgment for plaintiffs, and defendant brings the case here.

There is no merit in the contention that the complaint fails to state facts sufficient to constitute a cause of action. After plaintiffs had made out a *prima facie* case, and introduced the notes in evidence, defendant offered to prove that W. W. Allen, president of the defendant bank at the time the notes were executed, had no authority from the bank to sign its name thereto. The court excluded this evidence. This is assigned for error. Defendant's plea of the general issue or a general denial did not put in issue the authority of the agent to execute the notes. Under the Arkansas practice, which governed (*Pac. Mut. Life Ins. Co. v. Adams,* 27 Okla. 496, 112 Pac. 1026), a plea of the general issue amounted to nothing. In *McIlroy v. Buckner,* 35 Ark. 555, the court said:

"The Code provides (Gantt's Digest, sec. 4569) that the answer shall contain 'a denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief,' and also, if necessary, 'a statement of any new matter constituting a defense, counterclaim or set-off.' In estimating the force and effect of the decisions in the code states in settling the practice under what is called the new system of procedure, we must carefully distinguish between the language of their several Codes. Whilst the general features of the new system are the same in all the states

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which have substituted it for the old common law and statutory system, there are still differences amongst the several state Codes, which, if overlooked, would make the decisions of one state unsafe precedents for another. With regard to the answer, these differences are material. In some states a general denial is expressly permitted. This is omitted in our Code, which, as above quoted, requires a denial of each controverted allegation; and further provides that every material allegation in a pleading not specifically controverted by the answer or reply must be taken as true. *Id.*, sec. 4608. Taken together, these sections make it obligatory on the pleader specifically to deny every material allegation. This has been expressly held in Kentucky under a Code like ours, in a case where there had been a general denial of all the allegations of the complaint. The answer was held to be 'wholly unavailing.' *Corbin, etc., v. Commonwealth,* 2 Metc. [Ky.] 380. It follows that the general issue at common law has no place in our system, unless it in itself amounts to a specific denial of some material allegation."

See, also, *Shirk v. Williamson,* 50 Ark. 562, 9 S. W. 307, and *Hecht & Imboden v. Caughron,* 46 Ark. 132. As the defendant failed to conform to section 2872 of Mansf. Dig. (Ind. T. Ann. St. 1899, sec. 1987), which provided, "where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial is begun," it has nothing to complain of in the exclusion of the testimony offered.

Assailing the allegation in the petition that plaintiffs were purchasers for value, defendant, without objection, and by permission of the court, undertook to prove that plaintiffs had paid no consideration for the notes sued on, but had obtained their indorsement from the payee therein by paying off two certain mortgage notes for $6,500 originally made payable by them to W. W. Allen, and by him indorsed to said payee as collateral to secure the payment of said notes. The court did not err in excluding this testimony, for the reason that, if admitted, the same would not tend to prove a defense; for how could the failure of an indorsee from the payee to pay value for the paper release the maker from payment? The Missouri-Lincoln Trust Company being the payee in the notes, after the

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payment of the debt for which they were pledged as collateral, if not the beneficial owner thereof, was the legal holder of the same, and upon their indorsement passed the legal title thereto to the plaintiffs. As such, plaintiffs had a right to maintain this suit. *McNary v. Farmers' Nat. Bank, ante,* 124 Pac. 286.

In 14 En. Pl. & Pr. 682, it is said that where, as here, it is not alleged that the instrument is affected with any infirmity, a mere denial that it was indorsed or transferred to the defendant (plaintiff) for value is immaterial, and does not raise an issue as to the ownership of the instrument or present any defense. In *Aspinwall v. Meyer,* 2 Sandf. (N. Y.) 180, the court said:

"It is not enough for the maker of a note to say that it was transferred to the plaintiff who prosecutes it without a valuable consideration; but, to defeat a recovery on it, he must show that it was transferred in fraud, or to the prejudice of his rights."

See, also, *Queen City Bank v. Hudson et al.,* 8 App. Div. 27, 40 N. Y. Supp. 1018; *Guernsey v. Burns et al.,* 25 Wend. (N. Y.) 411; *Brassington v. Rohrs,* 3 Misc. Rep. 258, 22 N. Y. Supp. 761. In the syllabus of the latter case it is said:

In an action by a *bona fide* indorsee for value before maturity, against the maker of a promissory note, the answer first denied that the plaintiff was the holder of the note for value, and alleged that the payee was still the owner, and for a further defense alleged that said note was given to the payee for accommodation only, without consideration. *Held* that, a demurrer to the first part of the answer on the ground that it was insufficient in law having been sustained, the remaining portion of the answer was properly stricken out as sham, it appearing by the affidavit of the payee that the note was given for value, to which defendant made no reply. A denial that plaintiff is a holder of a note for value is not a denial that he is the holder and owner of it, and puts no material allegation in issue."

See, also, *Linney v. Thompson,* 3 Kan. App. 718, 45 Pac. 456.

There being no offer to prove any infirmity in the notes and no merit in the remaining assignments of error, the judgment of the trial court is affirmed.

All the Justices concur, except WILLIAMS, J., absent, and not participating.

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CREEK BANK & TRUST CO. v. JOHNSON *et al.*

No. 1853. Opinion Filed October 22, 1912.

(127 Pac. 480.)

APPEAL AND ERROR—Review—Sufficiency of Evidence. Where the evidence reasonably tends to support the verdict, the judgment of the trial court will be affirmed.

(Syllabus by the Court.)

Error from Creek County Court;
Josiah G. Davis, Judge.

Action by James G. Johnson and others against the Creek Bank & Trust Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Thompson & Smith, for plaintiff in error.

John G. Ellinghausen, for defendants in error.

PER CURIAM. On July 3, 1908, Jesse Ripley, doing business in Sapulpa, being indebted to the Creek Bank & Trust Company, plaintiff in error, in the sum of $1,441.19, executed to it a chattel mortgage on his stock of groceries, two mules, a delivery wagon, and a set of double harness, and on November 17, 1908, the same was duly filed with the register of deeds of Creek county as required by law. On November 21, 1908, after condition broken, the mortgaged property, together with his notes and fixtures, were turned over by Ripley to the mortgagee. Shortly thereafter, defendants in error sued the bank for the amount of their account, alleging that it had assumed the payment of the debt at the time of taking over the mortgaged property, which the bank denied. There was trial to a jury and judgment for plaintiffs before a justice of the peace, and later before the county court to which the case was appealed, and the bank brings the case here. There being evidence reasonably tending to support the verdict, the judgment of the trial court is affirmed.

There is no merit in the remaining assignments of error.

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WILLIAMS v. HAYCRAFT.

No. 1873. Opinion Filed October 22, 1912.

(127 Pac. 494.)

APPEAL AND ERROR—Briefs—Sufficiency. Where plaintiff in error fails to comply with the rules of this court in the preparation of his brief, the proceeding in error will be dismissed.

(Syllabus by the Court.)

Error from District Court, Choctaw County; Robert M. Rainey, Judge.

Action between Isham Williams and W. T. Haycraft. From the judgment, Williams brings error. Dismissed.

M. W. Gross and *Charles Roach,* for plaintiff in error.

R. H. Stanley, for defendant in error.

TURNER, C. J. On June 7, 1909, W. T. Haycraft, defendant in error, sued Isham Williams, plaintiff in error, in the district court of Choctaw county in damages for slander. After answer filed, there was trial to a jury and judgment for plaintiff, and defendant brings the case here.

For the reason that plaintiff in error has failed in his three-page brief to comply with any of the rules of this court, and nowhere in his brief has raised a question of law, this proceeding is dismissed.

All the Justices concur.

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FIRE ASS'N OF PHILADELPHIA v. BRYANT & WHISTLER *et al.*

QUEEN INS. CO. OF NORTH AMERICA v. SAME.

Nos. 1884, 1885. Opinion Filed September 11, 1912.

Rehearings Denied October 22, 1912.

(127 Pac. 699.)

APPEAL AND ERROR—Briefs—Sufficiency. This case follows that of **Arkansas Valley National Bank v. Clark**, 31 Okla. 413, 122 Pac. 135.

(Syllabus by the Court.)

Error from District Court, Craig County; T. L. Brown, Judge.

Actions between the Fire Association of Philadelphia and Bryant & Whistler and others, and between the Queen Insurance Company of North America and Bryant & Whistler and others. From the judgments, the insurance companies bring error. Affirmed.

Burwell, Crockett & Johnson, for plaintiffs in error.

Wm. P. Thompson, for defendants in error.

WILLIAMS, J. The only specification of error contained in the brief of the plaintiffs in error is as follows:

"Each of the plaintiffs in error filed a motion for new trial in the court below, which was overruled, and exceptions saved. We urge that these orders of the court constituted error, and are insisting upon the questions raised by these motions."

Neither do the grounds of the motion for new trial, nor any reference to the pleadings, anywhere appear in said brief.

In *Arkansas Valley National Bank v. Clark,* 31 Okla. 413, 122 Pac. 135, the syllabus is as follows:

"Rule 25 of the Supreme Court (20 Okla. xii, 95 Pac. viii), which provides that in all cases, except felonies, the brief of the plaintiff in error in substance shall set forth the material parts

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of the pleadings, proceedings, and facts upon which reliance is had for reversal, so that no examination of the record itself need be made in said court, and shall also contain specifications of the errors complained of, separately set forth and numbered, is mandatory, and where it is not observed, and counsel for the defendant in error in his brief insists that such rule has not been complied with, and the plaintiff in error, making no request for permission to amend its brief, permits said cause to be submitted with the briefs in that condition, the alleged errors will not be reviewed."

The brief totally fails to set out in substance the material part of the pleadings, or to contain the specifications of errors complained of, separately set forth and numbered, other than is hereinbefore mentioned.

Counsel for defendants in error insist that said brief totally fails, in the respects hereinbefore pointed out, to comply with said rule 25, *supra*. We think that the contention of the defendants in error should be sustained, and, on the authority of *Arkansas Valley National Bank v. Clark, supra,* the judgment of the lower court must be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

McGEHEE v. ALEXANDER.

No. 1892. Opinion Filed October 22, 1912.

(127 Pac. 480.)

LIMITATION OF ACTIONS—Bona Fide Purchaser—Stolen Property. The statute of limitations (Mansf. Dig. sec. 4478, Ind. T. Ann. St. 1899, sec. 2945) as to personal property stolen begins to run in favor of an innocent purchaser for value and against the true owner from the time the property is bought and taken possession of by the purchaser, and the bar falls when the same is by him held openly and notoriously for three years.

(Syllabus by the Court.)

Error from Stephens County Court;
W. H. Admire, Judge.

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Action by J. W. McGehee against Lynn Alexander. Judgment for defendant, and plaintiff brings error. Affirmed.

Gilbert & Bond, for plaintiff in error.

Womack & Brown, for defendant in error.

TURNER, C. J. This is an action in replevin for the possession of a mare. There was judgment for defendant in the county court, and plaintiff brings the case here. From the agreed statement of facts it appears that in the year 1900 the plaintiff McGehee was the owner of the mare in controversy; that at that time he was living three miles northeast of Davis in what was then Indian Territory; that the mare was stolen from him some time during that year; that, after making diligent search for her, he failed to find her; that he never knew of her whereabouts until he discovered her in the possession of the defendant Alexander ten miles northeast of Duncan in August, 1909; that since she was stolen the mare had never returned to the neighborhood from where she was taken; that Alexander bought her from one Porter, who lived about eleven miles northeast of Duncan, about November 1, 1907, for value and in good faith; that since then Alexander had held her openly and notoriously in his possession at the place where plaintiff found her and was uninformed of any claim of plaintiff to her until in July, 1909; that Porter bought her for value and in good faith in September, 1904, from one Davis, who held her openly and notoriously and claimed her as his property. Davis also lived eleven miles northeast of Duncan at the time he sold the mare to Porter.

It is assigned that the court erred in holding that the statute of limitations began to run against the plaintiff as soon as the animal passed into the possession of Porter, and that this action was barred at the time defendant bought her from Porter. Not so. At that time Mansf. Dig. of the Laws of Ark., sec. 4478, Ind. T. Ann. St. 1899, sec. 2945, was in force in that jurisdiction. It reads:

"The following actions shall be commenced within three years after the cause of action shall accrue, and not after. * * * Third. All actions for taking or injuring any goods or chattels."

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In *Vaut et al. v. Gatlin,* 31 Okla. 394, 120 Pac. 273, we held that this statute, as to personal property stolen, begins to run in favor of an innocent purchaser for value and against the true owner from the time the property is bought and taken possession of by the purchaser and that the bar falls when the same is by him held openly and notoriously for three years. The law in that case governs here. See, also, *Shelby v. Shaner,* 28 Okla. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621.

The judgment of the trial court is affirmed.

All the Justices concur.

ST. LOUIS, I. M. & S. RY. CO. v. BURROW.

No. 3018. Opinion Filed September 11, 1912.

Rehearing Denied October 22, 1912.

(127 Pac. 478.)

APPEAL AND ERROR—Record—Case-Made. The case-made and amendments having been transmitted to the trial judge, who settled and signed the same, but the case-made neither having been attested by the clerk, and the seal of the court thereto attached, nor filed in said court with the papers in the case, such case-made is a nullity, and cannot be considered in this court for the purpose of reviewing matters complained of in the trial court.

(Syllabus by the Court.)

Error from District Court, Sequoyah County; John H. Pitchford, Judge.

Action by Franklin Burrow, a minor, by his next friend, William H. Burrow, against the St. Louis, Iron Mountain & Southern Railway Co. Judgment for plaintiff, and defendant brings error. Dismissed.

Vincent M. Miles, for plaintiff in error.

Kyle & McCombs, for defendant in error.

WILLIAMS, J. Counsel for defendant in error move to dismiss this proceeding in error, on the ground that the case-made

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attached to the petition in error in this action does not show that it was ever attested by the clerk or filed with the papers in the case in the court below. Attached to said motion is the certificate of the district clerk, certifying that the records in his office do not show the filing of the case-made in said case, nor do said records show that said case-made was ever presented to him for attestation or filing, nor do they show any case-made ever filed or on file in said cause.

Counsel for plaintiff in error, in its response, says:

"The plaintiff in error states that the copy of this case-made was turned over to Kyle & McCombs, attorneys of record for the defendant in error, with the request to them and understanding by them that, as soon as it served their purpose, they would file the same with the clerk, and the plaintiff in error states that they now have, in their office at Sallisaw, Oklahoma, this copy of the case-made."

It seems to be conceded that neither was the case-made attested by the clerk of the district court nor was the case-made filed with the papers in the case in the lower court. Section 6074, Comp. Laws 1909 (section 4444, St. Okla. 1893; section 4741, Wilson's Rev. & Ann. St. 1903), provides that the case-made and amendments shall be submitted to the judge, who shall settle and sign the same, and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall then be filed with the papers in the case.

Such not having been done, the purported copy attached to the proceeding in error is a nullity, and this proceeding is dismissed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

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JEWITT v. WEST.

No. 4301. Opinion Filed October 22, 1912.

(127 Pac. 476.)

SCHOOLS AND SCHOOL DISTRICTS—Clerk of School District—Vacancy—Appointment—Mandamus. A certificate of appointment to the office of clerk of school district No. 105 of L. county "to fill the vacancy caused by the resignation of J. A. Hyles to continue in office until the next annual meeting and until his successor is elected and qualified," dated March 8, 1912, and signed by the county superintendent of that county, is **prima facie** evidence of title to that office, and entitles the appointee to maintain mandamus against one claiming the office, by virtue of an unauthorized election held at the next annual school meeting of that district and a certificate of election issued pursuant thereto, to recover of him the paraphernalia thereto belonging.

(Syllabus by the Court.)

Error from District Court, Lincoln County; Chas. B. Wilson, Judge.

Action by Thomas J. West against J. W. Jewitt. Judgment for plaintiff, and defendant brings error. Affirmed.

Devereux & Hildreth and *Hepburn & Chappell,* for plaintiff in error.

Geo. B. Rittenhouse and *F. A. Rittenhouse,* for defendant in error.

TURNER, C. J. This is an action in mandamus brought by the defendant in error, Thomas J. West, against the plaintiff in error, J. W. Jewitt, to require him to turn over the paraphernalia belonging to the office of the clerk of school district No. 105 in Lincoln county. The motion, in the shape of a petition, substantially states that said school district was organized in May, 1893; that on June 7, 1910, J. A. Hyles was elected clerk thereof for three years, and that his term would have expired in June, 1913; that on or about March 8, 1912, said Hyles resigned as such, and on that day the county superintendent appointed Thomas J. West to fill the vacancy caused by the resignation of

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said Hyles; that said West thereupon qualified as such clerk. A copy of his appointment is attached as an exhibit. The motion further recites that said West is entitled to and does hold said office during the remainder of the term of said Hyles; that, notwithstanding his appointment to hold the same up to and including the first Tuesday in June, 1913, said school district held an election on June 4, 1912, and pretended to elect the defendant Jewitt as clerk of said district; that said West not knowing his rights in the premises, and by some mistake of fact between plaintiff and defendant on June 4, 1912, turned over and delivered to defendant a part of the property belonging to said office, consisting of the minute books, blanks, records, and other paraphernalia pertaining thereto; that on June 14, 1912, plaintiff demanded of defendant their return, which was refused, and, after alleging that he is without adequate remedy at law and unless granted relief irreparable injury will ensue to him, plaintiff prayed and was granted an alternative writ of mandamus. For answer to the alternative writ containing the allegations of the motion, defendant admits, in substance, all the allegations therein contained, and says that at the regular school election held pursuant to notice on June 4, 1912, he was regularly elected as clerk of said district; that he immediately qualified, took the oath of office, entered upon the discharge of its duties, and is now the regular qualified and acting clerk of said district. As an exhibit he files the minutes of the annual school meeting of said district of that date. He further alleges that said West was present at said meeting, and was a candidate for clerk and participated in said election; that there was no remedy by mandamus under the facts in this case, but that plaintiff's remedy, if any, was by *quo warranto*. For further answer he says: "That on the 7th day of June, 1912, at the town of Carney, the said plaintiff herein, T. J. West, resigned and relinquished all of his claim to the office of school district clerk of school district No. 105, and that by said resignation the said plaintiff herein has no claim or right to maintain this action, because he has forfeited, relinquished, and resigned the same, and this defendant is in possession of said office and of the paraphernalia thereof, and is ad-

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ministering the affairs of said office," and prayed that the writ be quashed. The record fails to disclose that there was judgment for plaintiff on the pleadings and hence we cannot consider an assignment of error based upon that premise. After trial on the merits judgment was entered as follows:

"Now on this, the 15th day of August, 1912, the above-entitled cause comes on for hearing upon the alternative writ of mandamus and the return of the alternative writ of mandamus, and the court, after hearing the evidence in said case and the arguments of counsel, finds that the plaintiff, Thos. J. West, has the *prima facie* title to the office of clerk of school district No. 105, in Lincoln county, Okla., and that he is entitled to the immediate possession of the property and effects belonging to said office, to wit" (describing it)

—and ordered the peremptory writ to go. Defendant brings the case here.

As the pleadings herein are required to consist only of the writ and answer (Comp. Laws 1909, sec. 6232), there being no evidence tending to show said resignation and no point of law raised thereon in the briefs, we will not further consider it.

Conceding, in effect, the absence of authority to hold the election, the result of which was declared to be the election of defendant to the office of clerk of the district, defendant contends "that where a party holds an office by color of title, as Jewitt does in this case, although there may have been no authority for the election, and the certificate issued wrongfully given, yet, having the possession of the office as Jewitt has in this case, he is a *de facto* officer, and his right to the office is good until it is attacked by *quo warranto,* and his title cannot be questioned by mandamus."

By plaintiff it is contended that as he was appointed to fill the vacancy, and thereby entitled to "continue in office until the next annual meeting thereafter and until his successor is elected and qualified" (Comp. Laws, sec. 8056), he has a right to hold until June, 1913; that as holder of the superintendent's certificate of appointment he holds the *prima facie* title to the office; and "that in the absence of a constitutional or statutory provision authorizing an election to be held to fill a vacancy, such an

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election cannot be held, and that if the same is held and a party is elected, as in the case at bar, to fill a vacancy, his election to such office is void, and that credentials issued pursuant to said election are insufficient to make him a *de facto* officer, and that any claim he might make to said office would be only colorable." Thus we are confronted with a situation similar to that which met us in *Matney v. King,* 20 Okla. 22, 93 Pac. 737, and the question for us to determine is which of these contending parties holds the *prima facie* title to this office. In that case the court said:

"The foregoing case (*Delgado v. Chavez* [140 U. S. 586, 11 Sup. Ct. 874], 35 L. Ed. 578) undoubtedly sustains the doctrine that, where two persons claiming title to the office of clerk of the district court present their credentials on which they based their claim to the office to the judge of the district court, and each request the court to recognize him as such clerk, it is the duty of the judge to examine such credentials for the purpose of determining which one of the claimants holds the *prima facie* title to the office, and such examination does not constitute passing upon the title to the public office."

Accepting, then, the concession that no authority existed to hold the election the result of which was to declare Jewitt elected, does this, together with his certificate of election, assuming one to have issued, confer on him *prima facie* title to the office? If no such authority existed, then defendant's election was without warrant of law, and therefore merely colorable and void, and his certificate insufficient to confer *prima facie* title to the office.

Matney v. King, supra, was mandamus to compel the respondent to recognize relator as clerk of the district court. In support of his *prima facie* title to the office he relied upon a certain certificate of election. As a return to the alternative writ respondent alleged that one Bucher claimed *prima facie* title to the office by certificate subsequently issued, pursuant to an erroneous construction placed upon section 16 of the election ordinance. These two certificates of election were examined by this court under all the facts in the case, and the certificate of petitioner held to constitute *prima facie* title to the office, and the writ ran

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after the court had held that Bucher's certificate was palpably without legal warrant and void. The court said:

"'Title to public office, based upon mistakes of fact or misconceptions of law, may impart a color or right which will bar the allowance of a mandamus; but palpable disregard of law renders the action whereby an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty.' *State of New Jersey v. Mayor,* 52 N. J. Law, 332, 19 Atl. 780, 7 L. R. A. 697. This is also a rule at common law. Thus in *Rex v. Bankes,* 3 Burr. 1452, Lord Mansfield proposed, upon the argument, that affidavits be laid before him that he might determine whether it was a doubtful election and fit to be tried upon an information in the nature of a *quo warranto,* or whether it was merely colorable, and clearly void, saying that in the former case the court might not grant a mandamus, while in the latter case they ought."

We are therefore of opinion that defendant's election and the certificate issued pursuant thereto were void, and afforded him no evidence of title to the office, and being an intruder therein, and wrongfully in possession by seizure of its paraphernalia, that mandamus is the proper remedy to compel him to turn them over—that is, if plaintiff himself has *prima facie* title to the office—for it is said in *Ewing v. Turner,* 2 Okla. 94, 35 Pac. 951:

"While it may be true that the courts will sometimes inquire incidentally into the title to the office in determining who is entitled to the official belongings thereof, yet no case can be cited where the court so held, unless the relator, at the same time, proved in himself at least a *prima facie* title thereto."

But of this there can be no question. Plaintiff holding, as he does, the certificate of appointment to the office "to fill the vacancy caused by the resignation of J. A. Hyles, to continue in office until the next annual meeting and until his successor is elected and qualified," of date March 8, 1912, and signed by "P. G. Rawdon, County Superintendent Lincoln County, Okla.," evidencing the *prima facie* title to the office, is entitled to the belongings thereto, the same having been parted with to defendant by mistake of fact.

The judgment of the trial court is affirmed.

All the Justices concur.

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GILLILAND v. WHITTLE *et al., County Election Board.*

No. 4403. Opinion Filed October 22, 1912.

(127 Pac. 698.)

CLERKS OF COURTS—Qualifications—Sex. A woman, otherwise qualified, is eligible to hold the office of clerk of the district court.

(Syllabus by the Court.)

Error from District Court, Jackson County; Frank Mathews, Judge.

Action by Henry C. Gilliland against J. E. Whittle and others, the county election board of Jackson county. Judgment for defendants, and plaintiff brings error. Affirmed.

W. T. McConnell, for plaintiff in error.

M. L. Hankins and *Guy P. Horton,* for defendants in error.

KANE, J. The case upon its merits turns upon the question: Is a woman, otherwise qualified, eligible to hold the office of clerk of the district court? Some objections of a technical nature are interposed by the defendants in error against any consideration of the merits, but, as we have reached the conclusion that the question must be answered in the affirmative, we do not deem it necessary to pass upon them. The appellant contends that inasmuch as section 27, article 6, of the Constitution, provides that the Commissioner of Charities and Corrections "may be of either sex," and section 6 of the Schedule to the Constitution provides that "female persons possessing the other qualifications prescribed by law shall be eligible to the office of notary public and of county superintendent of public instruction," the maxim, *"expressio unius est exclusio alterius"* applies, thereby excluding women from holding any office except those specifically named. We do not believe it was the intention of the framers of the Constitution or the people when they adopted it that this maxim should have the effect contended for. The Constitution

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discriminates between the sexes in prescribing the qualifications for such state officers as Governor, Lieutenant Governor, Secretary of State, etc., which offices must be filled by "male citizens." The members of the Corporation Commission and some other officers must be electors, which requirement is in effect the same as the words "male citizens," used in reference to the officers above named. The qualifications for supreme and district judges are elsewhere set out. In still another class, to which the office of clerk of the district court belongs, no specific qualifications are mentioned. If the contention of appellant is sound, then the special caution observed in the Constitution by the sections requiring the state officers above mentioned to be males would be wholly useless, as an application of the maxim would imply that requirement. A construction of the Constitution which renders meaningless any of its provisions should not be adopted. It is our opinion that the Constitution remits to the Legislature the subject of the proper qualifications to be possessed by the holders of such an office as is here in question. During the years prior to statehood, and the practice has been continued since, apparently by common consent women have creditably occupied many ministerial positions in county and state affairs. The office of clerk of the district court is ministerial in character, and the duties thereof are in no way incompatible with the incumbency of a woman who is competent to fill the office. The record shows that the woman who received the nomination in the instant case over her male competitors performed the duties of the office as deputy for a considerable time immediately prior to the primaries, and it was with a knowledge of her past services in that capacity she was chosen by the electors as a candidate for the office of clerk.

Women always have been admitted to the bar by the Supreme Court in this jurisdiction under both the territorial and state forms of government, and a considerable number are now practicing law with marked credit. In that connection it may be significant that the sections of the Constitution which prescribe the qualifications of the Supreme Court and district judges do not make any discrimination against any per-

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son holding these offices on account of sex. Section 3, art. 7, of the Constitution, provides:

"No person shall be eligible to the office of Justice of the Supreme Court unless he shall be at the time of his election a citizen of the United States and shall have been a resident of the territory embraced within the state for a period of two years, and of the territory comprising the district from which he is elected for a period of one year; and unless he shall have attained the age of thirty years, and shall have been a lawyer licensed by some court of record, or shall have been a judge of some court of record, or such judge and lawyer together at least five years."

And section 9 provides in relation to the qualifications of district judges that, "such judge shall be a citizen of the United States, and shall have been a resident of the territory embraced within the state for two years, and of the territory comprising his district at least one year, prior to his election; and he shall have been a lawyer licensed by some court of record, or shall have been a judge of some court of record, or both such lawyer and judge for four years next preceding his election, and shall reside in his district during his term of office." There are no qualifications prescribed by either the Constitution or the statutes which in terms make any distinction between the sexes in the matter of holding the office of clerk of the district court.

In Missouri there is no provision of the Constitution or the statute law expressly requiring the clerk of the county court to be a male. The statute provides that "no person shall be appointed or elected clerk of any court unless he be a citizen of the United States, above the age of twenty-one years. * * *" It was held:

"A woman is not disqualified because of her sex from taking the office of county clerk in Missouri. Women have been recognized as eligible to other offices in this state. A woman may be a citizen of the state and of the United States." (*State ex. rel. Crow, Atty. Gen., v. Hostetter*, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515.)

The same conclusion was reached by the Supreme Court of Nebraska in the cases of *State v. Cones*, 15 Neb. 444, 19 N. W. 682, and *State ex rel. Jordan v. Quible*, 86 Neb. 417, 125 N. W. 619, 27 L. R. A. (N. S.) 531, 21 Ann. Cas. 401. Other cases

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to the same effect are *State ex rel. v. George,* 23 Fla. 585; *In re Opinion of Judges,* 57 South. (Fla.) 351.

It seems to us that to take the position now that women are ineligible or do not possess the necessary qualifications to fill such offices upon the ground urged by appellant would be to turn back the hands of the clock, and to say that common experience and common sense must yield to the arbitrary application of an ancient maxim to a state of facts to which, to say the least, it is of very doubtful application. Moreover, we are of the opinion that it would be a distinct loss to the state to thus deprive it of the services of such an intelligent and efficient portion of its citizenship, and, as there is no constitutional or statutory provision specifically requiring it, we hold that under the law there is no express or implied barrier to the nomination of a woman as a candidate for the office of clerk of the district court, and that her fellow citizens may call her to discharge its duties if they see fit.

The judgment of the court below is accordingly affirmed.

TURNER, C. J., and HAYES, WILLIAMS, and DUNN, JJ., concur.

BRUNER *et al.* v. FT. SMITH & W. R. CO.

No. 1920. Opinion Filed October 23, 1912.

(127 Pac. 700.)

EMINENT DOMAIN—Proceedings to Take Property—Notice to Owners—"All Persons Interested." Where, in a suit for 160 acres of land, defendant disclaims as to all but 49 acres thereof, to which it sets up title in virtue of alleged condemnation proceedings pursuant to act of Congress approved February 28, 1902 (Act Feb. 28, 1902, c. 134, 32 St. at L. 43), which requires notice by the referees "to all persons interested," and where the notice given is "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the plaintiffs who were conceded to be the owners thereof, **held,** that said notice was void and conferred no jurisdiction on the court, and that, too, although the judgment approving the report of the referees recited that they "gave notice in the manner as provided by law."

(Syllabus by the Court.)

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Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by Benjamin F. Bruner and another against the Ft. Smith & Western Railroad Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded for new trial.

J. A. Baker and *W. T. Banks,* for plaintiffs in error.

C. E. & H. P. Warner and *John B. Patterson,* for defendant in error.

TURNER, C. J. On November 18, 1908, the plaintiff in error, Benjamin F. Bruner, and Ellen N. Bruner, his wife, in the district court of Okfuskee county, sued the Ft. Smith & Western Railroad Company, defendant in error, in ejectment to recover the possession of the S. W. ¼ of section 15, township 12 N., range 7 E., in that county. For answer defendant disclaimed as to all the land but 49 acres, as to which it set up title by virtue of certain condemnation proceedings in the United States Court for the Indian Territory, Western District, sitting at Muskogee. All parties in interest concede that the 160 acres sued for was the allotment of Floyd McKindly Bruner, and that plaintiffs are the owners thereof as heirs at law of him, and were up to the time of the entry of the judgment of the court approving the report of the referee therein. The judgment is assailed collaterally, and the only question for us to determine is whether the record in evidence in that proceeding discloses the same to be void on its face. In peremptorily instructing the jury at the close of all the testimony to find for defendant, the court held that it was not, but we think the court erred therein. Said condemnation proceeding was prosecuted under an act entitled "An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid & Anadarko Railway Company, and for other purposes." After providing for the appointment of referees to assess the damages, section 15 provides that:

"Before such referees shall proceed with the assessment of damages for any right of way or other land condemned under this

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act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspapers," etc.

In attempting to comply with said requirement in said proceeding defendant, after the appointment and qualification of referee pursuant to the prayer of its petition, published the following:

"Notice. In the United States Court for the Indian Territory in the Western District at Muskogee. In the matter of condemnation of a part of the S. W. ¼ of Sec. 15, T. 12, N. R. 7 E. Ind. M. by the Ft. Smith and Western Railroad Company, for railroad purposes. Notice is hereby given, that the undersigned referees duly appointed in the above entitled condemnation proceeding, will on the 28th day of Nov., '07, on the premises in question, proceed to assess the damages and make an award thereof, for the taking by the Ft. Smith and Western R. R. Co., the following described property for turn outs, side tracks and switches, to wit: [describing it.] The said award will be made between the hours of ten o'clock a. m. and two o'clock p. m. of said day, and all persons having any claim or any interest in said described premises of whatsoever kind or nature may at the time above mentioned appear before the undersigned referees, and be heard, if they so desire, touching their interest in the property and the damages to be awarded for the taking thereof. Given under our hands this 1st day of November, 1907. [Signed] J. L. Coons, Geo. A. Newman, J. W. Woods, Referees."

This is contended by plaintiffs in error to be void, because, they say, that, when the statute said that notice "shall be given to all parties interested," it meant that notice by naming such persons herein was intended, and that notice generally to "all persons having any claim or interest in said described premises of whatsoever kind or nature" to appear at the time mentioned was insufficient and that said notice is void. The point is well taken.

In *Lacik et al. v. Colorado, T. & M. Ry. Co. et al.*, 25 Okla. 282, 105 Pac. 655, we said:

"Proceedings in eminent domain are special, and the statutory requirements must be strictly complied with. *Colo. Fuel & Iron Co. v. Four Mile Ry. Co.*, 29 Colo. 90, 66 Pac. 902; 15 Cyc. pp. 575, 576; 10 Am. & Eng. Enc. of Law (2d Ed.) p. 1054, and authorities cited in footnote 3. Notice to the owner of the realty of the proposed condemnation is essential to the validity

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of the taking. *Aldredge v. School Dist. No. 16,* 10 Okla. 694, 65 Pac. 96."

In 2 Lewis, Eminent Domain, p. 578, it is said:

"Where the statute required notice to certain persons or classes of persons, as to the owners, occupants, persons interested, etc., it should be addressed to each of said persons by name in order to be binding"

—citing *Chicago & Alton R. Co. v. Smith,* 78 Ill. 96; *Birge v. Chicago, Mil. & St. P. R. Co.,* 65 Iowa, 440, 21 N. W. 767; *Warwick Institution for Saving v. Providence,* 12 R. I. 144.

In *Warwick Institution, etc., v. Providence, supra,* Flagg and wife, being the owners of certain real estate on a certain street in Providence, executed a mortgage thereof. Subsequently the city proposed under a certain act to widen the street by adding to it a strip of land taking some of it from the mortgaged property. Complainant, being a deficiency creditor after foreclosing his mortgage upon that part of the tract not condemned, filed his bill to foreclose upon that part of the strip taken to widen the street, claiming that, inasmuch as it was not notified or made a party to the proceedings, the same were void to the extent of its interest. The court said:

"We think the complainant is entitled to a decree of foreclosure. The act under which the street was widened requires the commissioners of estimate and assessment, before making their estimate and assessment, to give notice thereof to all persons interested in the land required, by publication in two newspapers. Such a notice was published, omitting, however, the name of the complainant. The act also directs the commissioners in making report to set forth the names of persons interested in lands taken or assessed, designating their respective lots, with the loss and damage, benefit, and advantage to each. The complainant was not named, it had no damages awarded to it, and, not being named, it did not receive notices from the city clerk and the Supreme Court, as required by the act. The proceeding was too defective in these particulars to bind the complainant. The record does not show any legal condemnation of its interest. The case is essentially the same as *Pettis v. City of Providence,* 11 R. I. 372."

And so we will hold, notwithstanding the judgment of the court approving the report of the referees recites that notice

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was given by them as provided by law. This for the reason that said jurisdictional finding is disputed by another part of the record, which is the notice itself. This is in keeping with the general rule. 17 Am. & Eng. En. of Law, 1081, lays it down thus:

"If a superior court of general jurisdiction expressly finds the existence of the jurisdictional facts, or they otherwise appear of record, they are conclusively established thereby, and cannot be questioned in a collateral proceeding. This is in accordance with the general rule that the record of a court imports such absolute verity that no person is allowed to contradict it in a collateral proceeding. But a finding of the court on the question of jurisdiction is not conclusive where the record itself shows that the finding is not true, because it is also a rule in regard to the effect of records as evidence that one part of a record may be impeached by another part"—and cases cited.

See, also, *Cloud v. Inhabitants of Pierce City,* 86 Mo. 359; *Harris v. Hardeman et al.,* 14 How. 334, 14 L. Ed. 444; *Harris v. Lester et al.,* 80 Ill. 307.

This view of the case renders it unnecessary to determine whether the proceeding is void for the alleged reason that the petition fails to set forth the fact of a failure to make amicable settlement with plaintiffs prior to the institution thereof.

The cause is reversed and remanded for a new trial.

All the Justices concur.

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ROBERTS *et al.* v. MARSHALL *et al.*

No. 4431. Opinion Filed October 24, 1912.

(127 Pac. 703.)

1. **MANDAMUS—Subject of Relief—Acts of Officers—Election Board.** Where the returns of a primary election have been made to the State Election Board by the county election boards of the counties constituting a legislative district, and such returns are regular in form, properly certified, and valid upon their face, and the State Election Board has met and canvassed such returns, declared the result thereof, and issued a certificate of nomination to the candidate shown to be successful by such returns, the State Election Board cannot be compelled by mandamus to meet and recanvass another set of returns subsequently certified to it by a county election board, either voluntarily or by order of court.

2. **SAME—Other Remedy—Quo Warranto.** A defeated candidate who complains that the returns canvassed by the State Election Board were irregular and fraudulently made by the county board has a remedy by an action in the nature of quo warranto against the holder of such nomination to try the title thereto.

(Syllabus by the Court.)

Error from District Court, Texas County; R. H. Loofbourrow, Judge.

Action by O. Marshall for mandamus to the State Election Board and others. From the judgment, defendants W. L. Roberts and others bring error. Reversed and remanded, with directions.

Orville T. Smith and *Ross N. Lillard,* for plaintiffs in error.

E. L. Fulton, for defendants in error.

HAYES, J. This action grows out of the recent primary election held on August 6th of this year throughout the state for the purpose of nominating by the different political parties candidates for various state and county offices. The action was instituted in the court below by defendant in error O. Marshall against the State Election Board and the county election board of Texas county as defendants. He alleges in his petition that

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both he and plaintiff in error W. L. Roberts were eligible to and were candidates for the nomination by the Democratic party for the office of representative from the legislative district composed of Texas and Cimarron counties, that on the face of the returns, certified by the various precinct election boards of Texas county, he received not less than 368 votes, and that the said Roberts received not more than 426 votes for such nomination; but he alleges that the county election board neglected and refused to certify to the State Election Board the true returns as certified by the precinct election boards of said county, and made false returns to the State Election Board to the effect that he received 349 votes and the said Roberts 531 votes; that, if the county election board had certified the votes actually cast in the county for said candidates as certified by the precinct boards, he would have received the nomination from said district by a vote of not less than 93. He further alleges that the State Election Board, however, canvassed the returns from said counties, certified to the State Election Board by the county boards, and thereon declared the result of said election to be that Roberts had received the nomination, and accordingly issued a certificate of nomination to him. In the prayer of his petition defendant in error Marshall, who will hereinafter be referred to as plaintiff, prayed that the court issue its order of mandamus to the county election board of Texas county, compelling them to reconvene and recanvass the votes cast in said county as certified in the returns of the precinct election officers, and to certify the result of such canvass to the State Election Board, and that the State Election Board be enjoined from placing upon the official ballot of the Democratic party for the general election to be held on November 5th of this year the name of Roberts for the office of State Representative of said counties, and that the State Election Board be required to place upon said ballot the name of plaintiff as candidate for said office, and also prayed for all further relief that might appear to the court right and proper.

The members of the State Election Board entered their appearance and filed an answer, denying some of the allegations of the petition and specifically admitting others. They allege

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by way of an affirmative defense that complete returns of the primary election in the counties of Texas and Cimarron were in due form made to the board and were duly canvassed by the board, and as a result of said canvass it was found that there were cast in Cimarron county 240 votes for plaintiff and 89 votes for Roberts; that in Texas county there were cast 349 votes for plaintiff and 531 votes for Roberts, making a total number of votes cast as shown by the returns filed by the two county election boards with the State Election Board of 589 votes for plaintiff and 620 votes for Roberts, whereupon the board declared Roberts nominated, and issued to him a certificate of nomination. The State Election Board alleges that it has no information concerning the votes cast for said candidate in the various precincts of Texas county, except as shown by the returns of the county election board of that county filed in the office of the State Election Board. The county election board, having unsuccessfully demurred to plaintiff's petition, filed an answer denying generally all the allegations of the petition, except they admit that an abstract of the votes from all the precincts in Texas county was made and certified to the State Election Board as set out in plaintiff's petition. They affirmatively allege that there were no returns by the precinct election officers of the precincts in Texas county as required by the provisions of section 7, c. 106, Sess. Laws 1910-11, and, upon ascertaining this fact, they sought the advice of counsel, and under his advice proceeded to count the ballots cast for said office in said county; that they correctly counted all the ballots from each and all the precincts of the county, and truthfully certified the result to the State Election Board; that their action was taken in good faith, and that an inspection of the ballots would show that the certificate made by them to the State Election Board is correct.

At this stage of the proceedings, plaintiff in error Roberts appeared and filed his motion, asking leave to be made party defendant and for permission to answer, which was granted. He admits most of the allegations of plaintiff's petition, except that he disclaims any knowledge or information of any fraud in the election and in the count and canvass of the returns of the votes

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therein, and says that, if any such fraud existed or was perpetrated, it was without his knowledge, procurement, or consent, and he asks that the court inquire into the legality of said election and cause to be counted the votes cast therein, to the end that the truth might be determined.

The trial court found, among other facts, that returns were made from all the election precincts of Texas county to the county election board in the manner required by law, and that they showed the vote to be substantially as alleged in plaintiff's petition; that, when the county election board canvassed these returns, they ignored the returns made by several precinct election boards, and, upon the advice of counsel, they opened the sealed packages containing the ballots voted at such precincts and from a count made by them of said ballots and from the returns from the other precincts prepared an abstract of the returns which were included in the returns made by the county board to the state board; that there was never any contest of the primary election filed with the county election board, nor any order made by a court authorizing the county election board to open the sealed packages and to count the ballots; that the State Election Board acted upon the return of votes made by it from the county board when it declared the result of the election to be the nomination of plaintiff in error Roberts and issued to him a certificate of nomination. Upon these facts the court concluded as a matter of law that the county board had no authority to open the sealed packages and count the ballots, that it was their duty to canvass the returns as made by the various precinct boards, and the judgment rendered by the trial court requires the county election board to reconvene and recanvass the votes as shown by the election returns from the various precincts and to certify the result thereof to the State Election Board, and requires the State Election Board to reconvene and recanvass said returns and to issue a certificate of nomination to plaintiff Marshall, that the certificate heretofore issued to Roberts be canceled; and that the name of Marshall be placed upon the ballot for the general election as the nominee of the Democratic party for Representative from that district.

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This appeal is prosecuted by petition in error and transcript. The evidence is not before us; and the only questions presented by the appeal, therefore, must arise out of the question whether the judgment is supported by the pleadings and the findings of fact of the trial court. Those two questions are: First. Does the petition state a cause of action for mandamus or injunction? Second, Does the answer of plaintiff in error Roberts convert the proceedings into a *quo warranto* proceeding? We think both of these questions must be answered in the negative.

The statute of this state makes it the duty of the precinct election officers, when they have completed the count of the vote in a precinct, to fill out the spaces in the back of the poll book, showing in words and figures the total number of votes cast in the precinct for each candidate. The poll book, together with the tally sheet, are required to be sealed up in an envelope, marked, "poll books and tally sheets." The voted ballots are required to be sealed in other envelopes, marked as by the statute designated, and all such envelopes are required to be returned by the precinct inspector and delivered to the county election board. The county election board is required, when said returns shall have been received, to open the envelopes containing the ballot books and tally sheets and list the result of the election for state officers upon blanks prepared for that purpose by the State Election Board, and to certify to the State Election Board the result of the vote upon all candidates upon the state ticket, and such certificates are made *prima facie* evidence of the correctness of such returns. The State Election Board is required to canvass the returns of the election from all the counties thus made and issue certificates of nomination to the successful candidates. It is admitted by all that the State Election Board, long prior to the institution of this suit, did canvass the returns that were made in due and legal form to it and properly certified to by the county election board. The primary and final purpose of plaintiff's action in the court below is to secure an order compelling the State Election Board to reconvene and redischarge this duty. Incidental thereto, he seeks to go beyond the returns made to the State Election Board by

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having the county board compelled to reconvene and recanvass the returns made to it, and certify again the result of the election in Texas county to the State Election Board.

The authority conferred and duty imposed by the statute upon the State Election Board is to ascertain the result of the vote for the candidate for any office by canvassing the vote cast in each county as shown by the abstract of votes from each county certified by the county election board to the state board. No judicial power is conferred for ascertaining such result from any other papers or other evidence. Its duties are ministerial, and it cannot hear evidence *aliunde* the returns or go behind the returns, regular and valid upon their face, for the purpose of determining whether the election officers of the county have irregularly or fraudulently canvassed the returns of any county. *Stearns et al. v. State ex rel.*, 23 Okla. 462, 100 Pac. 909. When the board examined the returns from Texas county, and determined that they had been made regularly and properly certified to by the officers authorized under the law to make and certify to same and that they were valid upon their face, they had but one duty to perform, and that was to canvass the vote certified, which they did. In doing so they acted within the law, and the issuance by them of a certificate of nomination to Roberts was a lawful act, and such certificate, when issued, was valid.

If their act in issuing this certificate is now unlawful and such certificate invalid, it must be so because this court, after going behind the returns, which the board could not go behind, determines that certain subordinate officers of the election machinery have committed irregularities or fraud; but to ascertain these facts is to try the title to the nomination, and not to try the question of whether the state board has performed the duty the statute imposes upon it. This cannot be done in this character of proceeding; for, by section 3303, Comp. Laws 1909, it is provided that all contests arising out of primary elections shall be settled and decided in the same manner as is now and may hereafter be provided for general elections, except as otherwise provided by the statute, and the proper procedure for con-

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testing an election or trying title to an office is an action in the nature of *quo warranto* (*Newhouse v. Alexander*, 27 Okla. 46, 110 Pac. 1121, 30 L. R. A. [N. S.] 602, Ann. Cas. 1912B, 674), except by specific provision of the statute a recount by the county election board may be had in a primary election upon the verified application of a candidate, setting up facts which, if true, would change the results of the election in his favor. Section 9, art. 4, c. 16, Sess. Laws 1909. The state board, having discharged the duty enjoined upon it by law, could not now by a writ of mandamus be compelled to do that which it has already done. The authorities are agreed that, when a canvassing board has counted the votes and declared the result according to law, it has no power or authority to make a recount. If the court could compel the board to reconvene and recount a new set of returns certified up to it, the board would have authority to do so without such action of the court; and the result would be that a canvassing board might from time to time, as new sets of returns might be certified to it, proceed to reconvene and declare a different result from the result declared from the next preceding canvass, and as declared by one author, "render the whole proceeding a farce." McCreary on Elections (3d Ed.) par. 232. *Rosenthal v. State Board of Canvassers*, 50 Kan. 129, 32 Pac. 129, 19 L. R. A. 157, and *O'Hara v. Powell et al.*, 80 N. C. 103, are directly in point. In the Kansas case, Rosenthal and a man by the name of Stubbs were candidates for election as a member of the House of Representatives of the state of Kansas. Upon the face of the returns filed with the county clerk, Rosenthal received 156 votes and Stubbs 123; but, when the returns from the county were certified to the state board of canvassers, from negligence or design the figures were transposed in the abstract so as to show that Stubbs received the highest vote. The state board of canvassers acted upon the returns, and issued a certificate of election to Stubbs. Thereafter a second certified abstract was voluntarily filed with the state board, showing the true vote, and showing that Rosenthal was elected. He brought his action to mandamus the state board of canvassers to reconvene and recanvass the vote and

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declare him elected, which the court refused to do. The only distinction between that case and the case at bar is that in that case the second set of returns, which plaintiff sought to have the state board canvass, were voluntarily made to it, whereas in this case they must be made under order of the court. In the North Carolina case, the state board of canvassers, pending the application of plaintiff for mandamus to compel a reassembling of the board of county canvassers and a recount of the votes cast in the county for candidates for the House of Representatives, met and canvassed the returns that had already been certified to the state board by said county board. Without determining whether in any event the board of county canvassers, who, having failed to perform the full duty imposed upon them by the statute, might be compelled by mandamus to reconvene and recanvass, the court held that the writ would not issue in that case, because the state board, acting upon the returns before it, regular upon their face, had declared the result of the election and issued a certificate of election, and a writ in that case could afford to plaintiff no relief, but that he had a speedy and adequate remedy at law by a proceeding in *quo warranto*. *State ex. rel. Rinder v. Goff*, 129 Wis. 668, 109 N. W. 628, 9 L. R. A. (N. S.) 916, is another case in point, and supports the rule of the foregoing cases.

Nor can plaintiff's contention that defendant Roberts' answer converted this proceeding into a proceeding in *quo warranto* be sustained. It is true that Roberts states in his answer that if any such fraud or irregularities exist or were perpetrated by the county election board, as is alleged in plaintiff's petition, he asks that the court inquire into the irregularity of said election and cause the votes cast therein to be counted to the end that the truth may be determined; but it is Roberts who holds the nomination and the *prima facie* title thereto now in controversy. Informations in the nature of *quo warranto* may be filed by the prosecuting officers of the state on behalf of the public against a person who has usurped an office or occupies the same without right or title. Such informations may, under certain circumstances, be filed upon the relation of private persons and

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by private person, but always against the occupant of the office. We know of no authority that holds that one who occupies the office may maintain such an action against one claiming title thereto in order that the rights of the claimant may be ascertained, and we can conceive of no reason upon which such a doctrine could be founded; and it appears that the trial court did not regard the proceeding as one in the nature of *quo warranto,* for he states as one of his conclusions of law that the court is not authorized in this proceeding to go behind the election returns, which is the correct rule in a mandamus proceeding, but not in a *quo warranto* proceeding.

The judgment of the trial court is reversed and the cause remanded, with direction to set aside and vacate the alternative writ, dissolve the temporary injunction, and to dismiss plaintiff's petition.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

PIONEER TELEPHONE & TELEGRAPH CO. v. STATE *et al.*

No. 1827. Opinion Filed October 22, 1912.

(127 Pac. 1073.)

1. **TELEGRAPHS AND TELEPHONES—Police Regulations—Telephone Rates.** Power on the part of an incorporated city or town to fix municipal telephone rates can only be derived from the Legislature by express grant or by necessary implication from powers expressly granted.

   (a) The Legislature did not, by subdivision 20 of section 512 of Wilson's Rev. & Ann. St. 1903, grant to the city of Oklahoma City the power of fixing those rates.

2. **SAME.** Where a municipality with no power to fix municipal telephone rates, by ordinance pursuant to subdivision 20 of section 512 of Wilson's Rev. & Ann. St. 1903, granted to a telephone company the right to occupy and use its streets and public ways, subject to certain police regulations, and by section 9 of said ordinance fixed municipal telephone rates, **held,** that said section to that extent is void, although accepted and acted upon between the parties in interest, and is not protected by article 9, sec. 18, of the

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Constitution, so as to prevent the Corporation Commission from establishing another or different rate pursuant to the same article and section.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Appeal by the Pioneer Telephone & Telegraph Company from an order of the Corporation Commission imposing a fine for violation of a prior order of the Commission. Affirmed.

S. H. Harris and *J. R. Spielman,* for plaintiff in error.

Chas. West, Chas. L. Moore, and *Jas. S. Twyford,* for defendants in error.

TURNER, C. J. On July 16, 1906, there was passed by the city council of the city of Oklahoma City, and approved by the mayor the next day, ordinance No. 625. Section 1 provided:

"That the right of way be and the same is hereby granted to the Pioneer Telephone & Telegraph Company, its successors and assigns, to erect and maintain lines of poles and posts, mains and manholes and wires along, in, and through, under and across the public streets, alleys, avenues, bridges and viaducts in the city of Oklahoma City, for the purpose of supplying citizens of said city and the public with communication by telephone or other improved electrical devices and for the purpose of operating a telephone exchange and telephone lines, such use to be and continue upon the terms and conditions hereinafter provided."

Section 2, after providing for the location of the poles, stipulated:

"This grant is made and is to be enjoyed subject to any proper and reasonable rules, regulations and ordinances of a public nature, as the mayor and city council are authorized to make, not destructive to the rights herein granted."

And it was further provided that the telephone company within one year from the date thereof should inclose all wires, with certain exceptions, within and without the fire limits. Section 3 provided that the right of use granted should not be exclusive, etc. Section 4 provided additional restrictions with reference to the placing of wires so as to have them least interfere with other public use of the streets, etc., and that they should

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not be unnecessarily obstructed. It was also provided that the grantee would hold the city harmless for any liability arising out of any act of negligence or omission of the grantee. Section 5 provided that in consideration thereof the telephone company would allow the city certain uses of their property for municipal purposes. Section 6 recited that, in further consideration of the city's patronage, the telephone company agreed to furnish to the city ten free telephones and certain other connections with exchange for city purposes at $1 per month per telephone, to be located by order of the city, and further provided that the city might have free use of the system in case of fire, riot, etc. In section 7 it was agreed on the part of the city that the use of the poles of the company, as stated, and the free reduced rate telephones offered shall be given by said company in place and instead of any city income, license tax, or unusual levy which the city might otherwise demand, etc. Section 8 provided that the company shall remove its wires after receipt of request from the mayor to permit the moving of houses, etc. Section 9 of said ordinance, among other things, provided:

"The maximum rate to be charged by the grantee for exchange service shall be dependent upon the total number of telephones within the city limits, and platted additions thereto connected with the local Oklahoma City exchange to which exchange service is given, as follows: (setting them forth)."

It is unnecessary to recite the other sections.

Thereafter, while appellant was doing business under said ordinance, on October 12, 1908, the Corporation Commission entered the following order, No. 101:

"It is ordered that no person, or persons, firms, company or corporation doing a transmission business by telephone for hire in the state of Oklahoma shall charge a greater or different rate for service or similar service in effect on October 12, 1908, without first having made application to the Corporation Commission therefor, and submitting to the commission the schedule of the proposed change, which, before taking effect, shall have the approval of the commission. This order shall be in full force and effect on and after November 3, 1908."

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On July 17, 1908, the Burrows Oil Company, one of the subscribers of the appellant company in said city, filed its complaint against said company, in effect:

"That the defendant, contrary to order No. 101 of the Corporation Commission of Oklahoma, have changed their rates which were in effect October 12, 1908, so that now we have to pay four dollars and ten cents monthly where we October 12, 1908, paid three dollars and seventy-five cents, all of which appears on receipted bills attached."

Later defendant appeared and filed answer, in effect an admission of the charge, and stood on its right so to do under said ordinance, which the commission, in effect, held was no defense, and fined it $100 and costs "for violating said order No. 101 and raising its telephone rates in Oklahoma City without first having obtained an order from the commission authorizing such raise." To reverse said order, which is No. 235, defendant brings the case here.

There can be no question of our jurisdiction to review said order and determine whether the commission had the power to make the order violated. *A., T. & S. F. Ry. Co. v. State et al.,* 31 Okla. 43, 119 Pac. 961; *G., C. & S. F. Ry. Co. v. State, ante,* 125 Pac. 1103.

The case turns upon the question of whether the commission had such power. If by subdivision 20 of section 512 of Wilson's Rev. & Ann. St. 1903, the Legislature granted to the city the governmental power of fixing and regulating municipal telephone rates, the effect of so doing in this instance was to suspend, during the life of the ordinance relied upon, the governmental power of fixing and regulating those same rates by the Corporation Commission, and order No. 101 is void. If, however, no such power was thereby granted, section 9 of the ordinance relied on is void and order No. 101 is valid and enforceable.

In *Home Tel. Co. v. Los Angeles,* 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176, the court said:

"The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its

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character, continuing in its nature, and capable of being vested in a municipal corporation. * * * The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme Legislature (in this case, the Legislature of the state) has the authority to make such a surrender unless the authority is clearly delegated to it by the supreme Legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court which will be referred to hereafter, and we need not delay further upon this point. It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368, 382 [22 Sup. Ct. 410], 46 L. Ed. 592, 605; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 508, 27 Sup. Ct. 762, 51 L. Ed. 115, 1160. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

In *State ex rel. Garner v. Missouri & K. Telephone Co.*, 189 Mo. 83, 88 S. W. 41, the body of the opinion says:

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation. * * *"

In that case, in the first paragraph of the syllabus, it was held:

"* * * That, while the enactment by the city of an ordinance fixing the maximum rate to be charged by telephone companies for telephone service in the city was expressly authorized by the charter, the state had not delegated to the city the power

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to exercise such authority in framing its charter, and the ordinance was void."

In *State ex rel. Wisconsin Telephone Co. v. City of Sheboygan,* 111 Wis. 23, 86 N. W. 657, the court, speaking of this power, said that it was inherent in the state and a necessary attribute of sovereignty; that it does not pass to a mere subdivision of government except by express grant or by necessary implication from other powers granted; that every citizen holds his property subject to the proper exercise of this power, either by the state Legislature direct or by a public or municipal corporation to which the Legislature may delegate it. Citing 1 Dill. Mun. Corp. sec. 141. Speaking to the point there in question, the court said:

"No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger and to determine in what manner the relator may erect its poles so as to accomplish this result. *Michigan T. Co. v. Benton Harbor,* 121 Mich. 512 [80 N. W. 386, 47 L. R. A. 104]. It has no authority to impose other conditions. That power rests in the Legislature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them."

Relying on such grant of governmental power by the Legislature to the city, appellant cites subdivision 20 of section 512, Wilson's Rev. & Ann. St. 1903, where it is claimed cities of appellant's class are vested with power "to authorize the construction and maintenance of street railways, water mains and water pipes, and gas mains and gas pipes, electric light and telephone wires, along or through the streets and alleys within the corporate limits and to grant franchises and rights to persons, associations or corporations for such purpose, and to regulate the same, but no exclusive rights shall be granted for any such purpose. The street may be granted on the same terms to all companies desiring to compete with each other in the business of

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furnishing gas, electricity, telephone accommodations, electric lights, water or street railway accommodations, and all shall be subject to the reasonable regulations by ordinance, which ordinance may be altered and changed at the pleasure of the council"—and insists that the power to fix said rates was thereby granted to the city; and that the right to change the rate from the lower to the higher, and to charge the rates complained of, was granted by the city to appellant under the municipal franchise contained in said ordinance; and that the same is protected by that part of article 9, sec. 18, of the Constitution, which reads:

"That nothing in this section shall impair the rights which have heretofore been or may hereafter be conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it, under a municipal or county franchise, granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise."

Assuming, but not deciding, that subdivision 20 of section 512, *supra,* is applicable to cities of the first class, we cannot agree with appellant that thereby the power to fix telephone rates was granted by the Legislature to the city. All that was thereby granted to the city pertinent to this case is apparent on its face, which is the power "to authorize the construction and maintenance of * * * telephone wires along or through the streets and alleys within the corporate limits and to grant franchises and rights to * * * corporations for such purposes and to regulate the same * * *"; the street to be granted on the same terms to all companies desiring to compete with each other in the business of furnishing telephone accommodations, and all to be subject to the reasonable regulation by ordinance, which ordinance may be altered and changed at the pleasure of the council.

The power to authorize the construction and maintenance of telephone wires along or through the streets and alleys and to grant franchises and rights to corporations for such purposes, whatever else it means, certainly contains no grant of power to the municipality to fix telephone rates by franchise or otherwise,

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and as part consideration therefor, as is here attempted. All the grant of power therein contained that we can see is the power to grant by franchise the right to construct and maintain telephone wires along the streets and alleys of the municipality under such terms of police regulations as may be from time to time ordained by the city. This being true, it follows that the right to automatically increase the rates in the manner sought to be fixed by section 9 of the ordinance—that is, for every 1,000 increase in telephones—does not exist, and that the attempt to grant this right in said section, being a nude pact between the city and the appellant, is binding on neither, and certainly not on the state.

Farmer v. Telephone Co., 72 Ohio St. 526, 74 N. E. 1078, was error to the circuit court of Columbiana county. The action below was brought by plaintiffs in error in the court of common pleas to obtain a mandatory injunction requiring defendant in error to place a telephone instrument in their place of business, pursuant to the terms specified and rates fixed by an ordinance of the city of Salem, by which the company was granted its rights to erect its poles, wires, etc., in the streets of that city. The material part of the ordinance was set out in the report of the case and proposed to fix the rates, as here. The first question before the appellate court was whether the contract as to the rates was within the power of the council to make, and, if not, was the defendant company estopped to set up as a defense that want of power. The first question was answered in the negative by sections 3461 and 3471 of the Revised Statutes set forth in the opinion. Upon the second the court said:

"It follows from what has preceded that the municipality possessed nothing in the way of a valuable right to bestow upon the company. Hence the promises of the company to do what it was not, and could not, by the city be required to do was a naked promise, without consideration. It therefore fails as a contract, and it is difficult to see how Farmer & Cotz could take advantage of a nude pact to raise an estoppel—a pact to which they were in no wise parties or privies in the eye of the law, and against a party with whom they had no contract or other legal relations whatever themselves."

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In the headnote it is said:

"Telephone companies organized in this state obtain power to construct their lines along the streets and public ways of municipal corporations from the state by virtue of sections of the Revised Statutes (3454 to 3471—8, inclusive), and not from the municipal authorities. The latter have the power, under section 3461, to agree with such companies as to the mode of use, and upon compensation for such use, but not beyond what may be necessary to restore the streets to former state of usefulness. They have not power to exact or receive compensation by way of free telephone service for themselves or for citizens, or to fix rates for telephone charges. Where such power to so obtain free service and fix rates is attempted to be exercised by the passage of an ordinance incorporating such provisions, the company will not be required to adhere to them by a court of equity by mandatory injunction, even though it be shown that the rates agreed upon and incorporated in the ordinance were so fixed at the solicitation of the company, and that the company thereby obtained a benefit which it would not have otherwise obtained in a mode of use of the streets more beneficial to it and more inconvenient to the public."

Having therefore reached the conclusion that by subdivision 20 of section 512, Wilson's Rev. & Ann. St. 1903, the Legislature granted no power to the city of Oklahoma City to fix and regulate municipal telephone rates, we are of opinion that its attempt so to do in section 9 of the ordinance, *supra,* did not suspend, during the life of the ordinance relied upon, the governmental power of fixing and regulating the rates of this defendant by the Corporation Commission, pursuant to the fourth subdivision of article 9 of section 18 of the Constitution, and that order No. 101 is valid and subsisting, and that the fine imposed by order No. 235 of the commission must be sustained.

The remaining questions sought to be raised may be disposed of by a quotation from *South McAlester-Eufaula Telephone Co. v. State ex rel.,* 25 Okla. 539, 106 Pac. 967, where Mr. Justice Kane, speaking for the court, said:

"* * * It is obvious that the line of authorities relied on by counsel for defendant in error to the effect that, when a municipality by ordinance duly enacted has granted a telephone or telegraph company the right to occupy and use its streets and public ways, and fix and settle the manner of such occupancy

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and use, and the privileges thereunder granted are accepted by the company and acted upon, the grant and acceptance becomes a binding contract between such company and the municipality, the obligations of which cannot be avoided or impaired, are not in point."

Order No. 235 of the Corporation Commission is affirmed.

All the Justices concur.

CONNOR v. TAILOR & LEAVERETTE.

No. 2105. Opinion Filed November 7, 1912.

(127 Pac. 1089.)

JUDGMENT—Joint Obligation. Under the practice existing in the Indian Territory prior to the erection of the state, where the obligation sued on is joint, the court may render judgment against one of two defendants, the other not having been served in the action, and an execution may issue thereon.

(Syllabus by the Court.)

Error from District Court, Pontotoc County;
A. T. West, Judge.

Action by I. R. Tailor and J. R. Leaverette, a co-partnership, doing business under the firm name of Tailor & Leaverette, against F. L. Connor. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. W. Hocker, for plaintiff in error.

J. B. Thompson, for defendants in error.

WILLIAMS, J. On July 20, 1906, the defendants in error, a firm composed of I. R. Tailor and J. R. Leaverette, as plaintiffs, filed a complaint at law, under the practice then existing in the Indian Territory, before the United States Commissioner for the Southern District of said territory, at Pauls Valley, against W. E. Caldwell and F. L. Connor, as defendants.

It was alleged that said defendant Connor resided within said commissioner's district; no allegation being made as to the

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residence of W. E. Caldwell. A writ of attachment was also sued out. In the affidavit for such writ it was averred that said W. E. Caldwell was a nonresident of the Indian Territory. There is nothing in the record to show that service was ever had upon said Caldwell. No appearance was ever made for said Caldwell. On Connor's application a change of venue was had from the Pauls Valley commissioner to the Ada district. Judgment was rendered in said court against Connor. The case was appealed by him to the United States Court, at Ada, where, the cause being tried *de novo,* a judgment was rendered against Connor in the sum of $248.16. A writ of error was then prosecuted by him to the United States Court of Appeals for the Indian Territory, at McAlester, where it was pending at the erection of the state.

By virtue of the provisions of the Enabling Act and the Schedule to the Constitution, said appeal being transferred to this court, on September 14, 1909, it was dismissed. *Connor v. Tailor & Leaverette,* 24 Okla. 704, 104 Pac. 65. Thereafter execution in due time and in due form was issued out of the district court of Pontotoc county, the successor to the United States Court for the Southern District, at Ada.

The sole ground on which the motion was made to quash the execution is that it was not issued upon a final judgment.

For the purpose of this case, it is assumed that an appeal will lie from the order denying the motion to quash the execution (*Koehler v. Ball,* 2 Kan. 160, 83 Am. Dec. 451; *Nicoll et ux. v. Midland Savings & Loan Co.,* 21 Okla. 591, 96 Pac. 744; *Nicholson et al. v. Midland Savings & Loan Co.,* 21 Okla. 598, 96 Pac. 747); and that such motion to quash was an available remedy. *Sanchez v. Carriaga,* 31 Cal. 170; Freeman on Executions, sec. 73.

It will also be assumed that the laws in force in the Indian Territory prior to the erection of the state apply as to the issuing of the execution. *Ex parte Howland,* 3 Okla. Cr. 142, 104 Pac. 927, Ann. Cas. 1912A, 840; section 365, Williams' Ann. Const. and authorities cited. Section 2967, Mansf. Dig. of Ark. (section 2082, Ind. Ter. Ann. St. 1899) provides:

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"An execution may issue upon any final judgment, order or decree of a court of record, for a liquidated sum of money and for interest and costs, or for costs alone."

It is insisted by plaintiff in error that the execution was not issued upon a final judgment, citing *Houston v. Brown,* 5 Ind. T. 361, 82 S. W. 775, and *Case v. Ingle,* 2 Ind. T. 309, 51 S. W. 958. The rule announced in these cases is that an order sustaining a separate demurrer of two defendants, no disposition of the case being made as to another defendant, is not a final order, and hence not appealable.

In *Neal et al. v. Singleton,* 26 Ark. 491, which was a controlling case in the Indian Territory prior to the erection of the state (*Missouri, O. & G. Ry. Co. v. Gentry,* 31 Okla. 579, 122 Pac. 537), the syllabus is as follows:

"Where several are jointly sued, some of whom are not served, judgment against those served will not be reversed on that account. * * *"

In the opinion it is said:

"In the case of *Kountz v. S. Brown et al.,* 16 B. Mon. [Ky.] 585, suit was brought against the owners of a steamboat for damage done to a wharf boat. Service was had on but one of the owners, and a judgment was rendered against the 'defendants,' and the court held that 'the judgment must be regarded as a judgment against the party served,' although it was, in terms, against the 'defendants,' in the plural; and in speaking of the right to appeal the court said: 'The judgment being, in legal estimation, a judgment against Kountz only, if right against him, it must stand, and he is the only appellant.' In the case of *Waller et al. v. Martin,* 17 B. Mon. [Ky.] 188, which was a case where some of the defendants had been served and others had not, and judgment rendered against the 'defendants,' the court said: 'Although the judgment is against the "defendants," without discrimination, it is to be understood as a judgment against those "defendants" only who were "served with process."' And the court continued by saying: 'It is no available objection to the judgment that no notice is taken of the defendants who were not served with process, and no express disposition made of the case as to them.' When it is taken into consideration that the Supreme Court of Kentucky was construing the language of a Code from which ours was copied literally upon this point, we may regard these cases as settling that point."

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In *Parke v. Meyer,* 28 Ark. 281, which is also a controlling case, it is said:

"At common law, when a party brought his action against two or more defendants upon a contract, he must recover against all the defendants or none. By section 3, c. 94, Gould's Digest, the common-law rule was changed, and joint obligations have been construed to have the same effect as joint and several, and recoveries had thereon in like manner. By sections 400 and 401 of the Code of Practice, it is provided that in an action against several defendants, the court may, in its discretion, render a judgment against one, leaving the action to proceed against the others. In the case before us, such discretion has been used, and a final judgment given against Parke. No error appearing on record, the judgment is affirmed."

See, also, *Nichols v. Dunphy et al.,* 58 Cal. 605.

The judgment on which the execution was issued having been rendered in a court of record, the same is presumptively regular and valid. *Le Breton v. Swartzel,* 14 Okla. 521, 78 Pac. 323.

The burden is upon the plaintiff in error in seeking to have the execution quashed. Caldwell not having been made a party in the court below, at all events the judgment against Connor was a final one. The order of the lower court must be affirmed.

HAYES, J., and KANE and DUNN, JJ., concur; TURNER, C. J., absent, and not participating.

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OKLAHOMA RY. CO. v. POWELL *et al.*

No. 3544. Opinion Filed November 7, 1912.

(127 Pac. 1080.)

CARRIERS—Street Railroads—Regulation—Transfers—Corporation Commission. The Corporation Commission ordered: "That on all days except Sundays, between the hours of six and eight a. m. and five-thirty and eight p. m., the defendant (appellant), the Oklahoma Railway Company, shall give transfers when requested by the passenger and that said transfers be honored at any point on the line for which they are marked. Between the hours of six and eight a. m. when two cars meet on a parallel track, they shall stop for the transfers of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. Between six and eight a. m., as one car is entering the terminal from Main street, if at the same time another car is coming out on Main street, and passengers on the incoming car desire to transfer to the outgoing car, the same as to Grand avenue, both cars should be stopped until passengers can transfer. At all other hours of the day the rules now in force by the company may be enforced. Transfers given to passengers on the outside of the terminal station may be different to those given on the inside." **Held,** that the commission had jurisdiction to make this order.

(a) Said order on review here is not shown to be unreasonable and unjust.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Proceeding by Mont R. Powell and others against the Oklahoma Railway Company for violation of an order of the Corporation Commission with reference to transferring passengers. Judgment for plaintiffs, and defendant appeals. Affirmed.

Shartel, Keaton & Wells and *Asp, Snyder, Owen & Lybrand,* for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for appellees.

WILLIAMS, J. This proceeding seeks to review an order of the Corporation Commission, which is in words and figures as follows:

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"The commission will issue the following order and should the same be abused by either the railway company or the patrons thereof, or any part thereof work unsatisfactory to the public, the commission will modify the same at any time upon application of either party, with a view of ultimately working out a satisfactory arrangement to all concerned. It is therefore ordered that on all days except Sundays, between the hours of six and eight a. m. and five- thirty and eight p. m. the defendant, the Oklahoma Railway Company, shall give transfers when requested by the passenger and that said transfers should be honored at any point on the line for which they are marked. Between the hours of six and eight a. m. when two cars meet on a parallel track, they shall stop for the transfer of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. Between six and eight a. m., as one car is entering the terminal from Main street, if at the same time another car is coming out on Main street, and passengers on the incoming car desire to transfer to the outgoing car, the same as to Grand avenue, both cars should be stopped until passengers can transfer. At all other hours of the day the rules now in force by the company may be enforced. Transfers given to passengers on the outside of the terminal station may be different to those given on the inside."

The appellant insists that (1) the commission was without jurisdiction to make said order, and (2) that if it had such jurisdiction the order is unreasonable and unjust.

1. The provision contained in section 18, art. 9, of the Constitution (section 234, Williams' Ann. Const. Okla.), is as follow:

"Provided, however, that nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town, or county to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise."

On January 30, 1902, the mayor and council of Oklahoma City passed an ordinance (No. 281) entitled:

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"An ordinance authorizing the Metropolitan Railway Company, of Oklahoma City, its successors and assigns, to construct and maintain an electric railway system in the streets and alleys of Oklahoma City and regulating the construction, operation and maintenance thereof"

—authorizing said railway company, among other things, to build and construct a system of electric street railways over and along the streets of said city, and defining the conditions of the exercise of the authority therein conferred. On February 8, 1902, the said railway company, in accordance with the requirements of said ordinance, filed with the city clerk of said city its acceptance of the terms and conditions thereof. On June 15, 1904, said railway company sold, conveyed, and assigned its said railway system, together with the franchise rights and privileges existing in its favor by virtue of said ordinance, to the Oklahoma Railway Company, the appellant herein.

Section 6 of the said ordinance provides:

"The mayor and councilmen of said city shall not be deemed by the granting of the privileges contained in this ordinance to have waived or abandoned the right to make any and all needful police regulations with reference to the operation or maintenance of said street car system, and shall at all times have the power to pass ordinances regulating the use of headlights, gongs and fenders and all other needful rules and regulations for the protection of the inhabitants of said city, in connection with the operation of said railway."

At the time said ordinance was passed granting said franchise, said Oklahoma City, being a city of the first class, possessed no corporate authority to pass such ordinance. Such authority was then possessed only by incorporated towns. Section 512, Wilson's Rev. & Ann. St. 1913, subd. 20; *South McAlester-Eufaula Tel. Co. v. State ex rel.*, 25 Okla. 524, 106 Pac. 962.

The Legislature of Oklahoma Territory in 1903 passed an act entitled:

"An act authorizing the organization of corporations for the construction of electric railways and defining the power of such corporations."

Section 3 of said act, which was approved March 16, 1903, provides:

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"All licenses or franchises heretofore granted to any street railway company authorizing the construction and operation of an electric street railroad in any city of the first class in the territory of Oklahoma, and which have not become forfeited or lapsed by their terms, are hereby ratified, legalized and confirmed. (Section 3, art. 4, c. 9, p. 141, Sess. Laws 1903).

Section 2 of said act (Sess. Laws 1903, p. 141) also provides:

"Such corporations in addition to the powers exercised by railroad corporations generally, may, with the consent of the authorities of any city or town in the territory of Oklahoma located upon or along its lines, construct system of street railways upon such streets and upon such terms and conditions as may be agreed upon between such corporations and such city or town, and may also accept lighting contracts with such cities or towns, to supply the said cities or the inhabitants thereof, with light or electric current for power or such railways or such corporation may also acquire by purchase or consolidation, plants, franchises, contracts, good will and other property of any existing street railway or lighting company."

It is insisted that section 6 of the ordinance hereinbefore set out has the effect, by virtue of said section 3 of the act of March 16, 1903, of granting such power to the municipality of Oklahoma City. It is not essential to determine whether section 3 of the act of March 16, 1903, in ratifying said franchise, could operate to have such effect by virtue of the ordinance, as we do not construe section 6 as conferring upon the authorities of the city of Oklahoma City the right to prescribe rules, regulations, or charges to be observed by said railway corporation in connection with any services to be performed by it for the patronizing public. Section 6 relates to the municipality's ordinary general power and authority over its streets and highways within its limits for the promotion of the health, safety, morals, and general welfare of its inhabitants. *South McAlester-Eufaula Tel. Co. v. State ex rel., supra;* Dillon on Municipal Corporations (5th Ed.) vol. 1, sec. 237, p. 450; *State ex rel. v. M. & K. Tel. Co.,* 189 Mo. 83, 88 S. W. 41. Such power every municipality may exercise, and if said proviso of said section 18 contemplated such powers on the part of municipalities, then the Corporation Com-

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mission could under no state of facts prescribe rules and regulations for street railways in municipalities.

In *South McAlester-Eufaula Tel. Co. v. State ex rel., supra,* this court held that the municipality of Hartshorne, under its ordinary general authority within its limits, for the promotion of the health, safety, and morals and general welfare of its inhabitants, had no right to impose conditions upon the telephone company in consideration for the grant of the use of its streets, unless such authority was expressly granted by the sovereign power. In the same case it was held that the power to regulate the manner of construction of a telephone line did not grant the authority to fix rates by contract, franchise, or ordinance.

We conclude that, at the time of the erection of the state, no right had theretofore been conferred by law upon the authorities of Oklahoma City to prescribe rules and regulations to be observed by said street railway company, as the terms are used in said proviso to section 18, art. 9, *supra.*

(a) Since the erection of the state, said city has adopted a charter by virtue of the provisions of article 18 of the Constitution. Section 5 of article 1 of the charter authorizes said municipality within its limits and within fifteen miles without to construct, condemn, and purchase, acquire, lease, improve, add to, maintain, and conduct and operate, in whole or in part, a street railway system. Said section contains the following proviso:

"Provided, however, that the power to condemn shall not be exercised for the purpose of acquiring such utilities now existing and operating under franchises granted by the city, except under the terms of said franchises. Provided, further, that the same exemption from the power to condemn may be embodied in any franchise for any other public service utility corporation that may hereafter be submitted to a vote of the people."

Section 7 of article 18 of the Constitution is substantially incorporated in said charter as section 1, art. 8, thereof. Section 2 of the same article of said charter is as follows:

"The board of commissioners shall be vested with the power of adopting all laws and ordinances not inconsistent with the Constitution and laws of this state for the taxation, regulation

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and control of all public service and public utility corporations now or hereafter existing or operating in whole or in part within the city."

Section 7 of article 18 of the Constitution provides:

"No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."

This is a limitation (not a grant of power) and prevents the municipality from ever surrendering or contracting away such power when it may be granted to it by the sovereign power. *Thompson et al. v. Rearick, ante,* 124 Pac. 951.

Missouri has substantially the same constitutional provision as this state for framing charters of municipalities. Section 16, art. 9, Const. of Missouri 1875. Paragraphs 1 and 2 of the syllabus in *State ex rel. v. M. & K. Tel. Co.,* 189 Mo. 83, 88 S. W. 41, are as follows:

"Const. Mo. art. 9, sec. 16, provides that any city having a population of more than 100,000 may frame a charter for its own government, 'consistent with and subject to the Constitution and laws of this state,' etc. The so-called 'Enabling Act' of 1887, providing the means for cities to avail themselves of that constitutional privilege, provides (Acts 1887, p. 51, sec. 50; Rev. St. 1899, sec. 6408) that such city shall have exclusive control over its public highways, streets, etc. Section 51 (Rev. St. 1899, sec. 6409) declares that it shall be lawful for any such city in such charter, or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state or any other authority. Under such act and constitutional provision, Kansas City in 1889 adopted its charter literally embodying therein said two sections. Article 3, sec. 1, of the charter, provides that the city shall have power by ordinance to regulate the prices to be charged by telephone companies and to compel them and all persons and corporations using, controlling, or managing electric wires for any purpose to put and keep their wires under

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ground, and to regulate the manner of doing the same. The 'general welfare' clause of the charter authorizes the city to pass any ordinance that 'may be expedient in maintaining the peace, order, good government, health, and welfare of the city, * * * or that may be necessary and proper for carrying into effect the provisions of this charter.' *Held* that, while the enactment by the city of an ordinance fixing the maximum rate to be charged by telephone companies for telephone service in the city was expressly authorized by the charter, the state had not delegated to the city the power to exercise such authority in framing its charter, and the ordinance was void. (1)

"The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state granting the franchise or suffering it to be exercised within its borders, which power may be conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government." (2)

In the opinion it is said:

"But under that Constitution cities of certain descriptions were authorized to frame their own charters. A charter framed under that clause of the Constitution, within the limits therein contemplated, has a force and effect equal to one granted by an act of the Legislature. But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the General Assembly, because the Constitution does not confer on the city the right to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality, yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. The words in the Constitution, 'may frame a charter for its own government,' mean, 'may frame a charter for the government of itself as a city,' which includes all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties

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of the inhabitants in the city, as between themselves. Nor does the Constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are many matters local to the city, requiring governmental protection, which are foreign to the scope of municipal government. In none of the cases that have been before this court, bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875, have we given to this constitutional provision any broader meaning than above indicated. *St. Louis v. Bell Tel. Co.,* 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; *State v. Field,* 99 Mo. 353, 12 S. W. 802; *Kansas City v. Scarritt,* 127 Mo. 646, 29 S. W. 845, 30 S. W. 111; *State ex rel. Subway Co. v. St. Louis,* 145 Mo. 574, 46 S. W. 981, 42 L. R. A. 113; *Kansas City v. Stegmiller,* 151 Mo. 189, 52 S. W. 723; *Young v. Kansas City,* 152 Mo. 662, 54 S. W. 535. The regulation of prices to be charged by a corporation intrusted with a franchise of a public utility character is within the sovereign power of the state that grants the franchise or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government. The authority of Kansas City to insert in its charter the power to regulate the price to be charged for telephone service within the city is not conferred by the constitutional provision above quoted. Is it conferred by what is called the 'Enabling Act' of 1887? The purpose of that act was to enable cities of the class named to avail themselves of that constitutional provision. It is entitled: 'An act providing that any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government and regulating the same.' There is nothing, therefore, in the title that indicates an intention to confer on such cities any power except that conferred by the Constitution. In its grant of power it so closely copies the language of the Constitution that its meaning to keep within the lines there drawn is obvious. There is nothing in the whole act of 54 sections that purports to confer on the city any powers except those appertaining essentially to the government of the city, unless, as is contended by the relator, sections 50 and 51 above quoted confer such powers. Section 50 confers on the city 'exclusive control over its public highways, streets, avenues, alleys and public places,' etc., and section 51 authorizes the city to provide in its charter 'for regulating and controlling the exercise by any per-

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son or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state of Missouri, or any other authority.' The exclusive control of its streets as granted in section 50 is an attribute of municipal authority, and could have been adopted in the charter, under the authority of the Constitution, without the express sanction of the General Assembly. The word 'exclusive,' however, in that connection, is not to be given its unlimited meaning, but must be understood as subject to the control of the state whenever the state chooses to assume control. The constitutional grant of power under which the charter is formed says that it must always be subject to the Constitution and laws of the state, which we interpret to mean that, in all matters not appertaining to city government, the charter is subordinate to the will of the General Assembly. The Legislature, in conferring on the city the exclusive control of its streets, meant exclusive control for the purposes of the city government, not to the exclusion of the state in other matters. The General Assembly, except as limited in the Constitution, has jurisdiction to grant franchises to be exercised in the streets of the cities and other public highways in the state, and that jurisdiction has not been surrendered either to cities with charters under the Constitution or to other municipalities. In adopting these two sections (50 and 51) of the so-called 'Enabling Act,' the Legislature had in view the necessity of power in the city to control its streets and other public places, and the power in the state to grant franchises to be exercised by the grantee in the streets and other public places of the city, and it was not difficult to foresee that a clash might occur between the city in its exclusive control of the street, and the private corporation in the exercise of the franchise granted by the state. Therefore, after granting to the city, as it did in section 50, control of its streets, the thought occurred to the lawmakers that there were private corporations organized and to be organized under the laws of this state with express authority to use the streets and other public highways in the exercise of their franchises, and, in order to prevent any clash that might occur between the city in its control of the streets and the private corporation in its use of the same, section 51 was added, which gave the city power to regulate and control the private corporation in its use of the street. Under the power, the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or do anything within reason to render the use of the street by the private corporation as little of injury

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to the public as may be. But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city."

See, also, *Straw v. Harris,* 54 Ore. 424, 103 Pac. 777; *Kiernan v. City of Portland,* 57 Ore. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339.

In *Lackey et al. v. State ex rel. Grant et al.,* 29 Okla. 255, 116 Pac. 913, this court in construing section 3a of article 18 of the Constitution of this state, under which provision the present charter of Oklahoma City was framed, approved the doctrine of the Missouri case in construing the charter provision of the Missouri Constitution.

In *Mitchell v. Carter,* 31 Okla. 592, 122 Pac. 691; *Lackey et al. v. State ex rel. Grant et al., supra,* was followed. In the opinion it is said:

"In *Lackey v. State,* 29 Okla. 255, 116 Pac. 913, this court, in construing said statute, said: 'It is clear that the foregoing statute intends to provide that, wherever a freeholders' charter has been adopted under the provisions of the Constitution, and conflicts with any law of the state relating to municipal matters of cities of the first class, the provisions of such charter shall prevail.' In other words, the effect of said statute was to declare the law as it already existed in the Constitution, merely setting out the same in greater detail than as contained in article 18. In *Lackey v. State, supra,* the rule was declared that, whenever any matter fell 'within the domain of municipal government' or related solely to municipal affairs, such provision of a municipal charter, adopted pursuant to the provisions of article 18, superseded the general state laws."

Mitchell v. Carter, supra, is cited with approval in *Cotteral et al. v. Barker et al.,* 34 Okla. ——, 126 Pac. 211. It follows that any provision contained in said charter, unless the same relates purely to municipal matters, is not within the grant, unless the act of Legislature of May 28, 1908, entitled, "An act to enable all cities containing a population of more than two thousand inhabitants to frame and adopt charters for their own government, and to extend and define their powers," has such effect. Sess. Laws 1908, c. 12, art. 4. Section 4 of said act is as follows:

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"When a charter for any city of this state shall have been framed, adopted and approved according to the provisions of this act, any provisions of such charter shall be in conflict with any law or laws relating to cities of the first class in force at the time of the adoption and approval of such charter, the provisions of such charter shall prevail and be in full force, notwithstanding such conflict, and shall operate as a repeal or suspension of such state law or laws to the extent of such conflict; and such state law or laws shall not thereafter be operative in so far as they are in conflict with such charter: Provided, that such charter shall be consistent with and subject to the provisions of the Constitution, and not in conflict with the provisions of the Constitution and laws relating to the exercise of the initiative and referendum, and other general laws of the state not relative to cities of the first class."

All legislative grants of powers to municipal bodies which are "out of the usual range, or which grant franchises, or rights of that nature, or which may result in public burdens, or which in their exercise touch the right to liberty or property, or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant, must be strictly construed." 1 Dillon on Municipal Corporations (5th Ed.) sec. 239, p. 452, and authorities cited in footnotes 1 and 2.

As was said in *Mitchell v. Carter, supra,* said section 4 was merely declaratory of the rights that already existed under the Constitution, elaborating and setting out the same more in detail. It does not appear that it was the intention of the Legislature to grant any greater powers of sovereignty than had already been granted under provisions of article 18 of the Constitution, which is self-executing. *State ex rel. v. Scales, Mayor, et al.,* 21 Okla. 683, 97 Pac. 584; *Stearns, Mayor, et al. v. State ex rel.,* 23 Okla. 462, 100 Pac. 909. In view of said rule of strict construction of corporate powers being applicable to grants of power to municipal bodies which are out of the usual range, we must conclude that Oklahoma City under its charter, adopted by virtue of sections 3a and 3b, art. 18, Const., without further authorization by the Legislature, may not prescribe rules and regulations to be observed and fix rates to be charged by the appellant in

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the performance of its duties towards the patronizing public as a public service corporation.

2. The commission heard the evidence and made the order against the appellant. The matters under consideration here involve the management of a street railway system and are largely administrative in their nature. Corporation Commissioners, by experience and study and application, become skilled and proficient in such matters; at least, they are presumed so to be. There are matters connected with the management and operation of such plants that are very difficult to be brought out or made to appear on the record; hence one of the reasons for incorporating the provision in said section that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable, and correct. This court has time and again held that such action, when sustained by any evidence, must be overcome or rebutted by facts in the record as weighed and found by this court on review, before it will disturb the same. See authorities cited under section 240, Williams' Ann. Const. Okla.

The only part of the order about which we have any doubt is that which requires:

"Between the hours of six and eight a. m. when two cars meet on a parallel track, they shall stop for the transfer of passengers. Example: If a University car going west on Main street between Broadway and the terminal should meet a Capitol Hill or Stock Yards car, both cars shall stop to transfer passengers if they have any. * * *"

Obviously it is intended by this that the cars are to stop only in the event there are passengers who desire to transfer from one to the other car. This could be done by signals, and, if after a test it is impractical to stop these cars except at regular stations or stops on application, this part of the order may be modified.

This appeal has been pending in this court for five months, the order not having been superseded; and, had the practical operation under this order shown that it was impractical to stop the cars to transfer from one to another on signals, it could have been brought to the attention of this court by a proper petition to have the cause remanded to have such evidence taken and incorporated in the record. Such not having been done, it is as-

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sumed that the practical operation of the cars in this respect has not brought about any serious inconvenience. As to matters that involve the practical operation of trains and cars, the commissioners, who are brought directly and in intimate contact with such matters in the performance of their duties, are in a far better position to pass on this question than we are, and the commission having made this finding, in view of the presumption that the law makes in its favor, we will not disturb the same.

This order cannot be reasonably construed so as to require stop-over privileges on transfer slips to be allowed. No such question is presented on this record.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

Ex parte DEICKMAN.

No. 4210. Opinion Filed November 7, 1912.

(127 Pac. 1077.)

1. **QUIETING TITLE—Habeas Corpus—Equitable Relief—Decree—Contempt.** P. brought an action in the district court against D. and others to clear the title to certain land. Said court, having acquired jurisdiction of D. and of the subject-matter, ordered that said title be cleared, and that D. procure conveyance in favor of P. from L., a nonresident of the state, who was not a party to said proceedings. **Held,** that so much of said order as required D. to procure the conveyance from L. was in excess of its power.

   (a) Said court having adjudged D. to be in contempt for failure to comply with said command, and that he be imprisoned therefor, this court, upon a writ of **habeas corpus,** directs that he be discharged.

2. **COURTS—Supreme Court—Original Jurisdiction—Habeas Corpus.** This court has original jurisdiction in all matters of **habeas corpus.**

(Syllabus by the Court.)

Habeas corpus on petition of Carl Deickman. Writ allowed, and petitioner discharged.

Watts & Watts and *Kistler, McAdams & Haskell,* for petitioner.

Blair & Brown, opposed.

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WILLIAMS, J. It is essential to pass upon the following questions: (1) Was the decree of the district court, commanding petitioner to procure a deed from a third person, not a party to the proceeding, and deliver same to plaintiff, in excess of the power of said court, although it had jurisdiction of both the person and the subject-matter of the action? (2) Has this court jurisdiction of this proceeding?

It was formerly the practice of the English Courts of Chancery to grant decrees for the specific performance of contracts for the conveyance of land, entered into by husbands without the concurrence of their wives, and to imprison such husbands, as for contempt, as a means of coercing the wives into releasing their dower interest. This practice, however, long ago met with the disapproval of the English Chancellors. *Emery v. Wase,* 8 Ves. 505. This rule seems, however, not to have taken root in the American states. Story's Equity Jurisprudence, sec. 732; 2 Pomeroy's Equitable Remedies, sec. 756 (6 Pom. Eq. Jur. [3d Ed.] sec. 756); *Edrington v. Harper,* 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; *Clark v. Seirer,* 7 Watts (Pa.) 107, 32 Am. Dec. 745; *Fisher v. Worrall,* 5 Watts & S. (Pa.) 478; *Weed et al. v. Terry,* 2 Doug. (Mich.) 344, 45 Am. Dec. 257; *Compton v. Nuttle,* 2 Ind. 416; *Barbour v. Hickey,* 2 App. D. C. 207, 210, 24 L. R. A. 763.

The exercise of this jurisdiction by the English Chancellors in this class of cases was upon the conclusive presumption that the husband had procured the wife's consent before making the contract. No such presumption could exist in cases where there is no contract sought to be enforced, as in the case at bar. Whatever title Lakin had was sought to be taken away from him by means of this order, without his first having been made a party to the proceeding in the district court. The trial court having jurisdiction of the person of the relator and the subject-matter, is the judgment requiring the relator to procure a conveyance from said Lakin, divesting such title as he may have from himself and revesting same in Sam Pea, in excess of the power of said court?

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Chief Justice Waite, in delivering the opinion of the court in (*Ex parte Rowland,* 104 U. S. 604, 26 L. Ed. 861), said:

"The single question we have to consider on this application is whether the order of the circuit court, made on the 21st of November, is sufficient authority to the marshal for the detention of the persons he holds under it; and that question, as is conceded on both sides, depends entirely on the power of that court to require the court of county commissioners to do what its members have been held in contempt for not doing. If the command of the peremptory writ of mandamus was in all respects such as the circuit court had jurisdiction to make, the proceedings for the contempt are not reviewable here. But if the command was, in whole or in part, beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right, in law, to punish for any contempt of its unauthorized requirements. * * * As a necessary consequence the writ must issue directly against him whose duty it is to do the thing which the parties seek to have done; for, as was said in *Reg. v. Mayor of Derby* (2 Salk. 436), 'it is absurd that the writ should be directed to one person to command another.' The question here is whether it was the duty of the tax collector, under the law, to collect the special tax which the commissioners had levied. That question the creditor could have had determined in a direct proceeding against the collector, without the help of the commissioners. It follows that if the command of the writ against the commissioners was what the circuit court has construed it to be it was in excess of the jurisdiction of the court, and consequently void. If the command of the writ was in excess of jurisdiction, so necessarily were the proceedings for contempt in not obeying. We are led, therefore, to the conclusion that the order of the court, under which the marshal holds the petitioners in custody, was a nullity, and that a writ of *habeas corpus* should issue as prayed for, unless the parties are willing that an order of discharge shall be entered without further proceedings."

See, also, *United States v. Walker,* 109 U. S. 258, 3 Sup. Ct. 277, 27 L. Ed. 927; *Ex parte Fisk,* 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Ex parte Gudenoge,* 2 Okla. Cr. 110, 100 Pac. 39; *McHenry et al. v. State,* 91 Miss. 562, 44 South. 831, 16 L. R. A. (N. S.) 1063.

This being an original proceeding in *habeas corpus,* it is not essential to determine whether this contempt be a civil or crim-

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inal proceeding, as in any event the court would have jurisdiction under writ of *habeas corpus*. *Ex parte Anderson, ante,* 124 Pac. 980.

HAYES, KANE, and DUNN, JJ., concur; TURNER, C. J., absent, and not participating.

OKLAHOMA RY. CO. v. STATE.

No. 3920. Opinion Filed November 12, 1912.

(127 Pac. 1085.)

CARRIERS—Regulation—Corporation Commission Order—Violation—Defenses. Where a street railway company is charged with not having complied with the order of the Corporation Commission, which required it to stop its cars at certain stations or street crossings, such omission having been proved to have been willful on the part of the parties in control of said car, held that, although the general manager of said company may have instructed its employees in control of such car or cars to observe said order and make said stops, such instructions did not exonerate the appellant.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

Proceeding by the State against the Oklahoma Railway Company for violation of an order of the Corporation Commission. Judgment for plaintiff, and defendant appeals. Affirmed.

Asp, Snyder, Owen & Lybrand, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for the State.

WILLIAMS, J. The appellant after a trial before the Corporation Commission was adjudged guilty of violating order No. 436, which is as follows:

"It is therefore ordered that the defendant, the Oklahoma Railway Company, stop its local cars upon the customary signal for the purpose of taking on and letting off passengers at each street crossing on what is known as its Belle Isle line until further ordered by the Commission."

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The complaint charged the violation of the order in that it failed to stop its south-bound car No. 129 at Fourteenth street and Classen boulevard for the purpose of receiving and allowing passengers to board the car, at or about 12:55 p. m., on September 1, 1911.

The evidence, without contradiction, shows that the motorman and conductor of the car at the time failed to stop said car. Ed C. Rixse, the complaining witness, testified that he ran alongside the car for 40 feet expecting it to stop so that he could board it. W. R. Perkins testified as follows:

"* * * The car slowed down, and I took hold of the rail and stepped on it and it started out and left him (Rixse) standing there. * * * I stepped on and said to the conductor, 'Wait a minute, there is another man wants on,' and he says, 'Don't make any difference, there is another car coming right behind this one.' Q. You were both standing at the curb, were you? A. Yes, sir. Q. The car wouldn't have had to wait a second? A. No, sir; it didn't come to a full stop. Q. Do you know whether the car stopped at any stations after yours before it arrived at town? A. It passed Fourteenth and stopped on Thirteenth."

The evidence also showed that there was not another car for between eight and ten minutes, which was No. 128, and for which the passenger Rixse waited. Neither the conductor nor the motorman were produced as witnesses at the hearing.

J. J. Johnson, assistant general manager of the appellant, testified that, on the date of the violation, the company had a breakdown at the power house, but that operators of the cars had general instructions to stop at all street crossings where necessary to take on or let off passengers; that the failure to stop, as alleged in the complaint, was in violation of the company's orders; that Riggenberg, the conductor, had been discharged for this offense, and for his carelessness in the service, his violation of orders, and his general disregard of orders; that Foote, the motorman, had not been discharged for this, his first offense, but let off with a severe reprimand; that it is a joint duty of the conductor and motorman to see that a car stops on signal from the passenger or intending passenger.

Section 19 of article 9 of the Constitution provides:

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"In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law."

It is insisted that, as the general manager had instructed the motorman and conductor of this car to comply with the order, upon which this prosecution was predicated, that absolves the appellant from punishment. The motorman and conductor, as agents of the appellant, were in control of this car at the time the order of the commission was violated by failure to stop same to receive passengers. Said omission of duty was by the act of said agents in the course and scope of their employment.

In *State v. Railroad,* 91 Tenn. 446, 19 S. W. 229, in an opinion by Judge Lurton, whilst a member of the Supreme Court of that state, it is said:

"Being a corporation, it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corporation; provided the agent did the act in the course and scope of his duty as an agent. It is immaterial that the agent was, by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise the public would be required to look alone to subordinates, in general unknown and ir-

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responsible. 2 Woods, Railway Law, pp. 1383, 1384, and authorities cited."

See, also, *A., T. & S. F. Ry. Co. v. State, ante,* 125 Pac. 721.

The question of jurisdiction of the Corporation Commission has been determined adversely to the contention of the appellant in *Oklahoma Ry. Co. v. Powell et al., ante,* 127 Pac. 1080.

The order of the commission is affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

OKLAHOMA RY. CO. v. ST. JOSEPH'S PAROCHIAL SCHOOL *et al.*

No. 3921. Opinion Filed November 12, 1912.

(127 Pac. 1087.)

CARRIERS — Street Railroads — Fares of School Children — "Public Schools." The Corporation Commission ordered: "That the defendant (appellant), the Oklahoma Railway Company, furnish to children under the age of fifteen years, going to or from St. Joseph's Parochial School, as pupils therein, tickets at the rate of two and one-half cents each in quantities of twenty tickets at one time. Such tickets to be used only in going to and returning from said school, to be honored for continuous passage and transfer on connecting lines over any other tracks of said defendant within the corporate limits of Oklahoma City. That such book of tickets shall not be limited to use on any particular day, but may be used any day on which the school may be in session." Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railway provides: "Tickets for the use of school children shall be furnished good for one continuous passage, in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city." **Held,** that "public schools of said city" include the public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolence.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

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Proceedings by St. Joseph's Parochial School and others against the Oklahoma Railway Company to enforce an order of the Corporation Commission requiring the railway company to issue tickets in quantities of twenty or more at one time to school children at the rate of two and one-half cents a fare, good for transportation of such children at particular hours. Decree for plaintiffs, and defendant appeals. Affirmed.

Asp, Snyder, Owen & Lybrand, for appellant.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for appellees.

WILLIAMS, J. On September 25, 1911, St. Joseph's Parochial School, by its agents, filed complaint against the appellant before the Corporation Commission asking that the appellant be required to carry school children, under the age of fifteen years, to its school at the rate of two and one-half cents each fare. After a hearing, the Corporation Commission made the following order:

"It is therefore ordered that the defendant, the Oklahoma Railway Company, furnish to children under the age of fifteen years, going to or from St. Joseph's Parochial School, as pupils therein, tickets at the rate of two and one-half cents each in quantities of twenty tickets at one time. Such tickets to be used only in going to and returning from said school, to be honored for continuous passage and transfer on connecting lines over any other tracks of said defendant within the corporate limits of Oklahoma City. That such book of tickets shall not be limited to use on any particular day, but may be used any day on which the school may be in session."

Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railway provides as follows:

"Tickets for the use of school children shall be furnished good for one continuous passage, in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city. United States mail carriers, policemen, and members of the fire department, while

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in the discharge of their duties, shall be carried free. Children under five years of age when accompanied by parents or guardians shall be carried free."

Said section also provides:

"The charges for transporting passengers to be exacted by said railway company shall not exceed the sum of five cents for one continuous passage over the said company's lines from points within the city limits to any other point in such city; such limit in price shall not prevent the exaction of an additional fare for return journeys, nor shall transfer slips be good for stop-over privileges."

This section was ratified by the Legislature of the territory of Oklahoma by act of March 16, 1903. Sess. Laws of 1903, p. 141; *Oklahoma Railway Co. v. Powell et al., ante,* 127 Pac. 1080.

Section 18, art. 9, of the Constitution, provides:

"The commission shall have the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void."

The appellant is a transmission company. Section 24, art. 9, Const.; section 252, Williams' Ann. Const. Okla. That the commission has jurisdiction to prescribe rules and regulations to be observed by the appellant is settled by *Oklahoma Railway Co. v. Powell et al., ante,* 127 Pac. 1080. Under appellant's franchise, in the performance of its public duty and its charges therefor, it must furnish tickets for the use of school children.

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The free public school system, which the Legislature of this state was directed to establish by section 1 of article 13 of the Constitution, is a matter of state concern and not a municipal affair. *Olson, County Clerk, v. Logan County Bank,* 29 Okla. 391, 118 Pac. 572; *Board of Education of the City of Ardmore v. State,* 26 Okla. 366, 109 Pac. 563. Prior to the erection of the state, the public schools were of general territorial concern. They were agencies of the territory doing the work of the territory. *School Dist. No. 17 v. Zediker,* 4 Okla. 599, 47 Pac. 482. To say that the state is hostile to all schools except the public schools of the state or those carried on in state institutions is not borne out by the record. True, section 5 of article 2 of the Constitution prohibits money or property being appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such (*Connell et al. v. Gray, ante,* 127 Pac. 417), and section 5 of article 1 also provides that provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; but section 4 of article 13 provides:

"The Legislature shall provide for the compulsory attendance at some public school or other school, unless other means of education are provided, of all the children in the state who are sound in mind and body, between the ages of eight and sixteen years, for at least three months in each year."

In said section 4 the makers of the Constitution recognized that parents might prefer their children to attend sectarian, denominational, or private schools rather than the public schools maintained by the state, and such is permitted. It is beyond the power of the legislative agencies of this state, under our Constitution, to require a parent to send his child to the public school if he affords him reasonable educational facilities at a sectarian, denominational, or private school. The city of Oklahoma City, as a municipality, had no schools.

A franchise of whatever kind, being against common right, must be strictly construed. Such franchises grant away to pri-

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vate persons or corporations property or rights in which the whole public is interested. Such grant cannot be presumed, and can only be established when the same is unequivocally expressed or is necessarily implied by the terms of the granting act. The grant is made at the solicitation of the grantee, supposed to be drawn up by him or his agents. The words used, therefore, should be treated as those of the grantee and be construed most strongly against him. This rule of construction is a salutary safeguard of the interest of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in express and plain terms. *Minneapolis v. Street Railway Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259; 3 Thompson on Corporations (2d Ed.) sec. 2874, and authorities cited.

In the ordinance or grant under consideration, the half-fare tickets were to be furnished for the use of school children. The council of Oklahoma City in adopting this ordinance, which was afterwards ratified by the Legislature of the territory, were acting as agents of the people of the municipality. In attempting to grant away certain privileges or rights, they exacted certain obligations from the grantee, and that was that school children should be furnished tickets for their use in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company might impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen years of age in actual attendance on the public schools of said city. The object in view was to facilitate the education of the children of the city. Is it to be assumed that the mayor and council of said city would enter into a contract with the grantee which could not be impaired in certain respects to extend over a long period of years—it may be in perpetuity—by which children of a certain age should be transported to the public schools maintained by public taxation at half price when other children, going to schools that were maintained by private agencies by private benevolence for the benefit of the public, should pay full fare? Such discrimination in making the contract is not to be presumed. A fair interpreta-

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tion of this contract leads to the conclusion that it covers children under the age of fifteen years attending schools in Oklahoma City, whether maintained by the public by taxation or by private agencies for the public by private benevolence.

The order of the commission was entered upon the theory that it had authority to regulate the rates to be charged by the appellant. The commission has no such power when it has the effect of impairing the franchise contract as ratified by the Legislature of Oklahoma territory. That question is unequivocally settled by the Supreme Court of the United States in *Minneapolis v. Minneapolis Street Railway Co.*, 215 U. S. 417, 30 Sup. Ct. 118, 54 L. Ed. 259. An order on appeal from said commission will not be vacated if the record shows proper ground to sustain same, though the commission, in entering same, gives a ground therefor not tenable under the law. *Hancock v. Youree et al.*, 25 Okla. 460, 106 Pac. 841.

It follows that the order will be affirmed.

TURNER, C. J., and HAYES, KANE, and DUNN, JJ., concur.

GROUND *et al.* v. DINGMAN *et al.*

No. 2022. Opinion Filed November 12, 1912.

(127 Pac. 1078.)

1. **INDIANS—Indian Lands—Death Before Enrollment—Descent and Distribution of Allotment.** The descent and distribution of the allotted lands of a citizen of the Creek Nation, who was living on April 1, 1899, and who died after the passage of the act of March 1, 1901, c. 676, 31 St. at L. 861, after which she was enrolled and certificate of allotment issued in her name, and later patent to the lands therein described issued to her heirs, is, by reason of section 28 of said act, governed by the law of descent and distribution of the Creek Nation, to be applied as if the deceased had received title to her allotment during her lifetime and died seised thereof.

2. **SAME—Descent.** Where T., a citizen of the Creek Nation, living on April 1, 1899, died intestate October 14, 1899, leaving her surviving her husband and their infant child, who died January

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1, 1900, without issue, and where, on April 15, 1900, the husband died intestate and without issue, leaving him surviving as his only heirs at law his two sisters, and where, after the passage of the act of March 1, 1901, c. 676, 31 St. at L. 861, T. was duly enrolled and certificate of allotment issued in her name, and later a patent to the lands therein described issued to her heirs, **held**, that upon her death said allotment went, by virtue of section 28 of said act, one-half to the father and one-half to the infant son; and that upon the death of the latter the whole estate went to the father, and upon the death of the father to his two sisters, the plaintiffs, as his only heirs at law.

(Syllabus by the Court.)

Error from District Court, Creek County; W. L. Barnum, Judge.

Ejectment by Jennetta Ground and others against Ross B. Dingman and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

J. A. Baker, Taylor, Pruiett & Sniggs, and *George C. Beidleman,* for plaintiffs in error.

R. A. Kleinschmidt, W. C. Franklin, P. J. Carey, Mann & Jackson, Thompson & Smith, and *Hughes & Miller,* for defendants in error.

TURNER, C. J. This is an action of ejectment brought by plaintiffs in error, plaintiffs below. From the opening statement of their counsel, at the close of which the court sustained "a demurrer to the facts as proposed to be proved by plaintiff," interposed by "the defendants other than Charles W. Mandler," it appears that Susan Thompson, or Stidham, a citizen of the Creek Nation, died intestate on October 14, 1899, leaving her surviving her husband, Charley Stidham, and their infant child John; that about January 1, 1900, the child died without issue, and on April 15, 1900, Stidham also died intestate and without issue, leaving him surviving as his only heirs at law his two sisters, the plaintiffs in this cause; that on May 15, 1901, said Susan Thompson was duly enrolled, a certificate of allotment issued in her name, and later a patent to the S. ½ of the S. ½ of section 26, township 18 N., range 11 E., issued to her heirs. Alleging that such they are under the Creek law of descent and distribution, plaintiffs

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bring this suit and deraign their title as stated. Defendants deraign their title to said allotment through the brother and sisters and the son of a deceased sister of said Susan Thompson, her surviving.

Section 28 of the act of Congress, dated March 1, 1901, entitled "An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians," etc. (31 St. at L. 869, c. 676), provides:

"All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the act of Congress approved June 28, 1898 [Act June 28, 1898, c. 517, 30 St. at L. 495], entitled 'An act for the protection of the people of the Indian Territory and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and be distributed to them accordingly."

Section 6 of the Creek law of descent and distribution, in force at that time, provided:

"Be it further enacted that if any person die without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases where there are no children the nearest relation shall inherit the property."

And section 8:

"The lawful or acknowledged wife of a deceased husband shall be entitled to one-half of the estate if there are no heirs, and an heir's part if there should be other heirs, in all cases where there is no will. The husband surviving shall inherit of a deceased wife in like manner."

It is nevertheless contended by plaintiffs that descent was cast at the time of the death of Susan Thompson, and hence they are entitled to her allotment through the husband and son, as stated; and by defendants that descent was cast as of the date of said agreement, and hence, as the child and husband of Susan Thompson were then dead, the allotment descended to them.

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Although seised of no estate of inheritance therein, that this land went, whether by descent or purchase it is immaterial to say, by virtue of section 28, *supra,* to the heirs of Susan Thompson, as designated by the Creek law, *supra,* in being at the time of her death, is no longer an open question in this jurisdiction.

In *Barnett et al. v. Way et al.,* 29 Okla. 780, 119 Pac. 418, Cita Barnett, an enrolled citizen of the Creek Nation, selected her allotment under section 11 of the Curtis Act, and died before the ratification of the original Creek treaty (Act March 1, 1901), wherein, by section 6, her allotment was ratified to her heirs. It was there held that the Creek law of descent and distribution governed the devolution of the estate, pursuant to section 28, *supra;* that her father her surviving took her allotment as though she had received title thereto during her lifetime and died seised thereof. In the syllabus the court said:

"The descent and distribution of the allotted lands of an enrolled Creek Indian, who died before the ratification of the original Creek treaty (Act March 1, 1901, c. 676, 31 St. at L. 861), and who had during her lifetime allotted to her, under section 11 of the Curtis Act (Act June 28, 1898, c. 517, 30 St. at L. 495), the use and occupancy of the surface of the allotment, which was thereafter, by section 6 of the original Creek treaty, ratified and deed issued to her heirs therefor, is, by reason of section 28 of the original Creek treaty, regulated and controlled by the law of descent and distribution of the Creek Nation. In determining who are the heirs of a deceased enrolled Creek Indian, who, during her lifetime, received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of section 6 of the original Creek treaty (Act March 1, 1901, c. 676, 31 St. at L. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seised thereof."

As there is no substantial difference between the facts in that case and this, and in neither did the allottee die seised of an estate of inheritance, the law there announced, in effect, that, having died before receiving her allotment, the land went to her heirs under the Creek law precisely as though the allottee was so seised at the time of her death, will be followed here.

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In *Morely et al. v. Fewel,* 32 Okla. 452, 122 Pac. 700, the facts were that Minnie Solander, the allottee, a citizen of the Creek Nation living on April 1, 1899, and duly enrolled as such, died intestate on October 8, 1899, leaving her surviving George A. Solander, her husband, and Hettie L. Solander, her child, who died intestate, without issue, December 19, 1899; that Phoebe Trussler was the only sister of Minnie Solander, who left no brother surviving, nor the descendants of any brothers or sisters; that on December 3, 1901, the Commission to the Five Civilized Tribes set apart the allotment of Minnie Solander, to which a patent was issued in the name of her heirs. The only question in that case was: Did George A. Solander inherit the lands allotted to the heirs of his wife, Minnie Solander? This court, speaking through Rosser, C., following the rule laid down in *Barnett v. Way, supra,* held that he did. In passing, the court said:

"The right of the heirs of Minnie Solander to select her allotment after her death was created by section 28 of the original Creek agreement. She had no title to the lands at her death, and it only came into existence after the original Creek agreement became the law; and the right in her heirs to have it selected after her death was created by the provisions of section 28 of that agreement. As the right was created by that section, it was competent to provide in the section who were the persons entitled to take under its provisions. By its terms the same persons are entitled to take as heirs of Minnie Solander as would have been entitled, had she selected the allotment in her lifetime, and lived until after the original Creek treaty took effect, and had then died seised of the land, leaving the same heirs, bearing the same relation to her and to each other at that time as they actually bore at the actual time of her death. If the land had been allotted to her and she had died while the original Creek treaty was in force, leaving George A. Solander and Hettie L. Solander, husband and daughter, living, her heirs would have been her husband, George A. Solander, and her daughter, Hettie L. Solander. Then, if Hettie L. Solander had died afterwards, without husband or issue, while that treaty was in force, her father would have inherited her land. The fact that George A. Solander was a white man would not have prevented him from inheriting as heir to his wife, nor as heir to

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his daughter. *De Graffenried v. Iowa Land & Trust Co.*, 20 Okla. 687, 95 Pac. 624."

We are therefore of opinion that, as Susan Thompson was a citizen of the Creek Nation living on April 1, 1899, and was enrolled as such and died before receiving her allotment, the devolution thereof fell squarely within the provisions of section 28, *supra,* which means that on the happening of that event, notwithstanding the fact that she could not and did not die seised therein of an estate of inheritance, the lands went to her heirs *in esse* at the time of her death, as designated by and according to the laws of descent and distribution of the Creek Nation, precisely in the same manner as though she had died seised thereof. It follows that under the Creek law made applicable by said section and construed by us in the de Graffenried case and the Barnett case, *supra,* at the time of her death the allotment of Susan Thompson went one-half to the father, Charles Stidham, and one-half to their infant son; and that upon the death of the latter the whole estate went to the father, and upon the death of the father to the plaintiffs as his sole heirs at law.

The cause is accordingly reversed and remanded for a new trial as to all the defendants, including Charles W. Mandler, whose demurrer was sustained to the petition. This for the reason that when the petition stated in substance, as it does, after describing the land sued for, that plaintiffs have the legal estate in fee simple and the equitable estate therein, and are entitled to the immediate possession thereof, that defendants unlawfully keep them out of possession and unlawfully withhold the same from them, the same states facts sufficient to constitute a cause of action pursuant to Wilson's Rev. & Ann. St. 1903, sec. 4788. It is so ordered.

All the Justices concur, except DUNN, J., absent, and not participating.

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PHILLIPS v. WILLIAMS *et ux.*

No. 1938. Opinion Filed November 12, 1912.

(127 Pac. 1072.)

MORTGAGES—Foreclosure—Maturity of Debt. Where W. and wife sued P. on two notes, due, respectively, April 4, 1910, and September 4, 1910, and to foreclose a real estate mortgage executed by him, of even date, to secure their payment, and where the notes contained no reference to the mortgage, but the latter provided that upon failure to pay principal and interest as evidenced by the first note, the mortgagees may declare the whole debt due "and payable at once and proceed to collect said debt * * * and to foreclose said mortgage."—**Held** that, although the notes and mortgage evidenced separate contracts, the mortgagees could take advantage of said clause to foreclose; and that a personal judgment on both notes was proper.

(Syllabus by the Court.)

Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by C. W. Williams and wife against W. H. Phillips. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. V. Cabell and *Jos. L. Hull,* for plaintiff in error.

Carlisle & Edwards, for defendants in error.

TURNER, C. J. On April 20, 1910, C. W. Williams and wife, defendants in error, sued W. H. Phillips, plaintiff in error, in the superior court of Oklahoma county on two promissory notes, each for $3,350, due, respectively, April 4, 1910, and September 4, 1910, and to foreclose a real estate mortgage executed by said Phillips, of even date therewith, to secure the same. While the notes contain no reference to the mortgage, the latter provides that upon failure to pay principal and interest as evidenced by the first note the mortgagees may declare the whole debt due. The petition avers the election of the mortgagees to declare the whole debt due, and prays for a personal judgment against the defendant. To that part of the

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petition which seeks personal judgment on the note not due, defendant moved to strike, and, when the court overruled the same, he saved exceptions. Failing to answer, a personal judgment was rendered and entered against him by default for the whole debt, and that the mortgage be foreclosed; and defendant brings the case here.

The question to be determined is whether the petition states facts sufficient to warrant a personal judgment for the whole debt, including the amount of the note due, on its face, September 4, 1910. Defendant contends that the clause of the mortgage providing for acceleration of payment cannot be taken advantage of to foreclose for general purposes, where, as here, the note and mortgage make no reference to each other, and for that reason are separate contracts. Not so, although such they have been held by us to be. *Farmers' Nat. Bank v. McCall,* 25 Okla. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

In *McClelland v. Bishop,* 42 Ohio St. at page 124, the court said:

"While it is true that all separate writings, made at the same time and relating to the same transactions, are, in the eyes of the law, as if embodied in one, yet it is not true that when in one contract, evidenced by a single paper, or in several relating to the same transaction, containing stipulations relating to matters in their nature separate, either should be construed so as to extinguish the other. If the construction claimed for the mortgage be given, it would extinguish the terms of the note. As well might the stipulations of the note extinguish those in the mortgage. The stipulation in the mortgage should be construed as providing a remedy on the mortgage; and that, so far as foreclosure proceedings are concerned, the notes for that purpose are due, but for general purposes the obligations on the notes are to be determined by their own express terms. In this way both contracts can stand and be fully enforced, according to the manifest intention of the parties."

And in the syllabus:

"Where there is a series of negotiable notes in the usual form, for distinct sums of money, payable at distinct and specified times in the future, with a mortgage to secure each, according to its tenor and effect, which contains a stipulation that, if default be made in the payment of any one, 'then each and all

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should fall due, and this mortgage to become absolute as to all said notes remaining unpaid at the happening of such default'—*Held,* that such stipulation relates to the remedy by foreclosure or other proceedings under the mortgage, and upon such default the mortgage may be foreclosed for the whole debt. It is a stipulation for the advantage of the mortgagee, and of full force as to a remedy on the mortgage, but does not operate to vary or extinguish the obligations expressed on the face of the notes themselves for general purposes."

This is in line, not only with what we held in the McCall case, but with what we said in *Core v. Smith,* 23 Okla. 909, 102 Pac. 114.

In *Darrow et al. v. John Scullin,* 19 Kan. 57, an opinion by Brewer, J., in the syllabus it is said:

"D. and wife executed three notes, and a mortgage to secure their payment. The notes, upon their face, were due in one, two, and three years, respectively; but the mortgage contained a stipulation that on default in payment of either all should immediately become due and payable. On default in the payment of the first note, suit was brought upon all three, and to foreclose the mortgage. A decree was entered, which, after finding that the mortgage was given to secure the three notes, but that only the first was due, rendered a personal judgment for the amount of that note, directed a sale of the mortgaged premises and the application of the proceeds to the payment of the judgment and then to the satisfaction of the two remaining notes in the order of their maturity, and awarded execution for any deficiency. *Held,* that personal judgment should have been entered for the amount of all the notes, but that this was not an error of which the mortgagors could complain. *Muzzy v. Knight,* 8 Kan. 456; *Meyer v. Graeber,* 19 Kan. 166; *Bank v. Peck,* 8 Kan. 660."

See, also, *Grand Is., etc., v. Moore et al.,* 40 Neb. 686, 59 N. W. 115; 2 Jones on Mort. (6th Ed.) sec. 1179a.

A personal judgment for the amount due is essential in actions to enforce a mortgage. Comp. Laws 1909, sec. 5921.

The judgment of the trial court is affirmed.

All the Justices concur, except DUNN, J., absent, and not participating.

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FARMERS' NAT. BANK OF DURANT v. ARDMORE WHOLESALE GROCERY CO. *et al.*

No. 1952. Opinion Filed November 12, 1912.

(127 Pac. 1071.)

EVIDENCE—Parol Evidence. Where B., for and in consideration of a sum certain in the bill of sale expressed, sells and conveys his stock of goods to the bank in satisfaction of his pre-existing indebtedness to the bank, with covenants of warranty against the claims and demands of all others, and where in a suit against B. and the bank on account for goods sold and delivered to B. prior to the execution of the bill of sale it is sought to charge the bank on the ground that it had assumed the payment of B.'s debts, **held,** that parol evidence is inadmissible to prove that the cashier of the bank had agreed with B., prior to the execution of the bill of sale, and the consideration therein expressed, to pay the debt in controversy.

(Syllabus by the Court.)

Error from Greer County Court;
Jarrett Todd, Judge.

Action by the Ardmore Wholesale Grocery Company against J. J. Baker & Co. and the Farmers' National Bank. Verdict for plaintiff, and the Farmers' National Bank brings error. Reversed and remanded.

Hatchett & Ferguson, for plaintiff in error.

TURNER, C. J. On April 29, 1909, the Ardmore Wholesale Grocery Company, a corporation, sued J. J. Baker, doing business as J. J. Baker & Co., and the Farmers' National Bank of Durant, in the county court of Greer county on account for $266.31 for goods, wares, and merchandise sold and delivered to J. J. Baker & Co. at his request, and prayed for judgment against both defendants, alleging that the bank had assumed payment of the debt. There was trial to a jury, and a verdict for plaintiff, upon which judgment was rendered and entered against defendants, and the Farmers' National Bank brings the case here.

It is assigned that the court erred in permitting Baker to testify over objection, in effect, that the cashier of the bank had, prior

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to the execution of the bill of sale conveying Baker's stock to the bank to satisfy his pre-existing indebtedness to the bank, agreed in parol with Baker that, in addition to the consideration therein expressed as paid for the stock, the bank would assume his debts, among which was the debt in controversy. This upon the ground that parol evidence of such an agreement was inadmissible to vary the written contract. The contract was, in effect, a bill of sale dated June 12, 1907, executed in consideration of $4,000 cash in hand paid by the bank to Baker wherein he "bargained, granted and sold" to the bank, its successors and assigns, all his stock of groceries, situated in a certain building in Durant, including shelving, fixtures, cash register, delivery wagon, and horses, covenanting therein with the bank that the same was free from all incumbrances, and that he would warrant and defend the title of the same against the claim and demands of any and all persons whomsoever.

As this contract of sale thus appears complete and in writing, wherein nothing is said about the payment of Baker's debts, the point is well taken, not only for the reason assigned, but for the further reason that the agreement if made was, in effect, to answer for the debt, default, or miscarriage of another and, being in parol, was void under the statute of frauds. *Bonicamp v. Starbuck,* 25 Okla. 483, 106 Pac. 839; *Threlkeld et al. v. Stewart,* 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; *Southland v. Arkansas Valley & W. Ry. Co.,* 24 Okla. 408, 103 Pac. 750; *McNinch v. Northwest Thresher Co.,* 23 Okla. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Railroad v. Rhodes,* 19 Okla. 21, 91 Pac. 1119, 21 L. R. A. (N. S.) 490; *Garrison v. Kress,* 19 Okla. 433, 91 Pac. 1130. In *McFarland v. McGill,* 16 Tex. Civ. App. 298, 299, 41 S. W. 402, 403, the court in the opinion states:

"The defendant addressed a special exception to that part of the petition, setting up as an additional consideration to the purchase of the horses, as disclosed by the bill of sale, the contemporaneous verbal agreement to furnish proofs of pedigree such as would enable the plaintiff to procure the registration of the horses. We think this special exception should have been sustained. The bill of sale ingrafted upon the allegation of the

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petition purports to be a complete contract in writing. It is not alleged that the omission to insert the additional consideration above specified was due to fraud, accident, or mistake. The statement of the consideration which the writing contains is contractual in its nature, and it cannot be varied by proof of a parol contemporaneous agreement ingrafting an additional consideration."

Defendants in error have failed to furnish us with a brief.

Reversed and remanded for a new trial.

All the Justices concur, except DUNN and WILLIAMS, JJ., absent, and not participating.

WHARTON *et al.* v. MILLER *et al.*

No. 4374. Opinion Filed November 12, 1912.

(127 Pac. 1063.)

RAILROADS—Corporation Commission—Orders—Right to Appeal—Interest. Where certain individuals seek to appeal from an order of the Corporation Commission directed against a certain railway company commanding it to maintain a depot at a certain point or station, only such parties as are affected by, or interested in, the service, conveniences, or facilities at such point or station may prosecute an appeal therefrom.

(a) The fact that the construction and maintenance of the station at W. may have the consequential or incidental effect of building a town at that point and retarding the growth of adjacent towns at stations B. and M., and thereby causing the depreciation of property located in said towns, is not a sufficient legal reason for parties interested in property located in either B. or M. to complain at the parties residing at W. being afforded all reasonable facilities, conveniences, and service as patrons of such public service corporation at said station.

(Syllabus by the Court.)

Appeal from the State Corporation Commission.

The Corporation Commission having directed the Wichita Falls & Northwestern Railway Company to either build a station at Willow or move the depot from Moravia to Willow, on complaint of J. W. Miller and others, T. J. Wharton and others appeal. Dismissed.

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A. R. Garrett, for appellants.

Chas. West, Atty. Gen., and *Chas. L. Moore,* Asst. Atty. Gen., for appellees.

WILLIAMS, J. It is moved that this appeal be dismissed on the ground that the petition in error shows that the appellants have no such interest as will entitle them to have the order reviewed. The order appealed from, which was made on the complaint of J. W. Miller and others, residing in the town of Willow, requires the Wichita Falls & Northwestern Railway Company to "either build a depot at Willow something of the size of that now located at Moravia or Brinkman, or shall move the depot from Moravia to Willow," and "construct some additional switch track and build stock pens and a cotton platform." The railroad company has not appealed from this order. After it was entered, however, the appellants, J. T. Wharton, I. R. Warren, Rounds & Porter Lumber Company, N. Massad, E. J. De Arman, O. R. Geter, S. J. Berry, William Sloan, A. F. Redburn and W. P. Lampert, of Brinkman, Okla., and Williams & Miller Gin Company and T. S. De Arman, of Moravia, Okla., filed a petition asking to be made parties and that a rehearing thereon be granted, which was overruled by said commission.

It is settled that a party must be affected by the order or interested therein in order to appeal therefrom. *Gulf, C. & S. F. Ry. Co. et al. v. State,* 26 Okla. 761, 110 Pac. 651; *State ex rel. North Carolina Corporation Commission et al. v. Southern Railway Co.,* 147 N. C. 483, 61 S. E. 271; section 238, Williams' Ann. Const. Okla., and authorities cited under footnote "a." Parties residing in the town of Brinkman are not interested in the facilities, conveniences, or public service afforded at Willow or at Moravia, nor are parties residing at Moravia interested in such service, conveniences, or facilities at Willow in such a way as to complain at such service, conveniences, or facilities being afforded at such place on the ground that it would be detrimental to the property interests at Brinkman and Moravia (*St. Louis, I. M. & S. Ry. Co. v. State,* 31 Okla. 509, 122 Pac. 217), but persons residing at Moravia and using that shipping station as pat-

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rons of the road at that point are interested in the service, conveniences, or facilities afforded at such station, and would be entitled to complain of that conditional portion of the order requiring the station to be moved from Moravia to Willow.

We gather from the assignments of error and the motion for a supersedeas made in this court that in this appeal complaint is made only on the ground that the railway company under this order, in constructing a depot at Willow, would occasion a depreciation of property interests at adjoining stations. Further, the transcript in this proceeding was filed on September 18, 1912. Neither has any response been made to the motion to dismiss this appeal, nor any brief filed by appellants.

It follows that the appeal will be dismissed.

TURNER, C. J., and HAYES and KANE, JJ., concur; DUNN, J., absent, and not participating.

ST. LOUIS & S. F. R. CO. v. CROWELL.

No. 2090. Opinion Filed November 12, 1912.

(127 Pac. 1063.)

1. **WITNESSES—Competency—Knowledge—Value.** To lay a foundation for the admission of evidence as to the value of millinery goods, kept for sale in stores, it is sufficient to show that the witness' knowledge was that of a dealer in such goods and also by getting prices of such goods at the time she made the purchase of the lot in controversy. The weight of the opinion then given is for the jury.

2. **TRIAL—Instructions—Request.** Where an instruction is correct as far as it goes, and it is urged by a party that under his theory of the case additional instructions should have been given, a reversal will not be had unless a supplemental instruction is requested by such contendant embodying such theory.

(Syllabus by the Court.)

Error from Rogers County Court;
Archibald Bonds, Judge.

Action by Jennie Crowell against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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W. F. Evans, R. A. Kleinschmidt, and *J. I. Howard,* for plaintiff in error.

J. W. Swarts, for defendant in error.

WILLIAMS, J. The defendant in error, as plaintiff, sued the plaintiff in error, as defendant, in the county court of Rogers county to recover damages in the sum of $251.85 for breach of duty in transporting over its line of railway a certain shipment of millinery goods consigned to plaintiff at Chelsea, Okla., on or about February 17, 1908, said consignment of goods reaching Chelsea about February 20, 1908; but, owing to the negligence of said defendant, same were not unloaded for delivery to plaintiff, but were carried through to some other point on its line. On March 5, 1908, the same were returned to Chelsea for delivery to plaintiff. As to whether they were tendered for delivery to her, there is a conflict in the evidence. On or about that date the agent rebilled the same over defendant's line to the consignor at Oklahoma City. Subsequently the goods were again forwarded by said consignor from Oklahoma City to Chelsea for plaintiff, arriving there about March 19, 1908, when the same were delivered to the plaintiff about March 30, 1908. After issues joined, the case was tried to a jury on October 5, 1909, and a verdict returned in favor of the plaintiff in the sum of $140.

1. The evidence showed that the plaintiff was engaged in the millinery business, and upon the whole record we think she showed herself qualified to testify as to the value of the goods in question. 1 Wigmore on Evidence (1st Ed.) sec. 716. In *Langdon v. Wintersteen,* 58 Neb. 280, 78 N. W. 502, it is said:

"Complaint is next made of the admission of the testimony of a Mrs. Hollenbeck as to the value of the goods in controversy. The ground of the objection is that her competency was not shown. It appeared that she had frequently priced and bought similar articles at retail, and in a general way knew their values. This was sufficient. The weight of her testimony was for the jury. No very precise or extended knowledge of values of articles of common use is essential to justify the trial court in admitting opinion evidence of this character."

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The property involved in that action was millinery goods. There the witness was not a milliner. In the case at bar the witness was engaged in the millinery business. She examined the goods in question and purchased the same. The witness testified as to the market value of the said goods before they were damaged. One of the reasons she gives for knowing their market value prior to the time of their damage was the price she paid for them. She bought them in open market. After they were damaged, they had no market value, and any one familiar with the nature and use of such goods was qualified to testify as to their value then. 1 Wigmore on Evidence (1st Ed.) secs. 714 and 716. As to the weight that should be given such evidence, that was a question for the jury.

The undisputed evidence in this record shows that the defendant was guilty of negligence in transporting the goods in question. As to whether the same were properly tendered to the plaintiff by the defendant on or about March 5th, that was a question under the evidence to be determined by the jury. If not duly tendered to her under the circumstances, it was proper to submit to the jury the depreciation of the value of the goods from on or about the 19th or 20th of February to the time they were delivered to the plaintiff in the latter part of March, 1908.

2. The giving of the following instruction is assigned as error:

"The court further instructs the jury that the market value of an article may be different at different times, places, and under different circumstances, and in this case you are to determine the difference in the market value of the goods when received by the defendant at Oklahoma City, and the time they were first delivered at Chelsea. If you find they were delivered prior to the actual delivery, but if you find that they were not delivered but the one time, and that was the date of the actual delivery, the defendant would be liable for damages for depreciation in value, if you find they were delayed."

Complaint is made that the court ignores the fact of defendant's (plaintiff in error) contention that the goods were at one time refused by the plaintiff and returned to Oklahoma City. Where an instruction is correct as far as it goes, but it is in-

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sisted that, under the facts in the case, additional instructions should have been given on plaintiff in error's theory, a reversal will not be had unless a supplemental instruction is requested embodying such theory. *First National Bank of Muskogee v. Tevis et al.*, 29 Okla. 714, 119 Pac. 218; *Moore v. O'Dell*, 27 Okla. 194, 111 Pac. 308; *Chicago, Rock Island & Pacific Railway Co. v. Baroni*, 32 Okla. 540, 122 Pac. 926.

Under the undisputed evidence in this case, the plaintiff in error was guilty of negligence. If the goods were tendered by the defendant to plaintiff on March 5, 1908, as contended for by defendant, she would be entitled to the difference in the depreciation of the property from the time in which they should have been delivered up to that time, but, if not tendered, then she was entitled to the difference in the value of the property at the time it was delivered and that at the time it ought to have been delivered to her. Affirmed.

TURNER, C. J., and HAYES and KANE, JJ., concur; DUNN, J., absent, and not participating.

BIERCE v. STATE NAT. BANK OF MEMPHIS, TENN.

No. 616. Opinion Filed May 14, 1912.

Rehearing Denied November 14, 1912.

(127 Pac. 856.)

BILLS AND NOTES—Appeal and Error—"Payment" by Indorser—Effect—Action by Indorsee—Real Party in Interest—Pleading—Affirmance of Judgment. Where, in response to a telegram from a bank, the indorsee of his note, B. telegraphs the bank to have P., the indorser, take it up and draw on him with note attached, and where the bank pursuant thereto sent said telegram to P., who, acting thereon, sends to the bank the check of G. drawn on funds in said bank, together with a sight draft drawn on B. in favor of said bank for the amount of said note and interest, directing the maker, on demand, to pay to said bank said amount, "note and telegram March 2d attached with exchange," and where said bank accepts said check, charges it to the account of G., credits its "bills receivable" with the amount, stamps on its "discount ledger" opposite the entry of the note "March 2, 1906," as the date "when paid," charges said draft on the re-

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mittance ledger to its correspondent bank and forwards same with note attached for collection, **held** that, by so accepting and charging said check, said note was paid by P. as indorser. **Held**, further, that on a return of the note unpaid by the maker, the bank, being the legal owner and holder thereof, was the real party in interest and could sue thereon and recover the full amount of said note from the maker. **Held**, further, that where a cause of action is tried upon a bad plea of confession and avoidance, and an immaterial issue found in favor of the plaintiff, the cause will not be reversed for a repleader, but the judgment will be affirmed where the petition states facts sufficient to constitute a cause of action.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; D. A. Richardson, Assigned Judge.

Action by the State National Bank of Memphis, Tenn., against William W. Bierce. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn, Ames & Chambers, for plaintiff in error.

Harris & Wilson, for defendant in error.

TURNER, C. J. On April 2, 1906, the State National Bank of Memphis, Tenn., defendant in error, sued W. W. Bierce, plaintiff in error, in the district court of Oklahoma county, stating in its petition a cause of action against him on a certain promissory note for $4,333.34, dated March 2, 1901, due five years after date, payable to the order of James K. Porter, and by him indorsed to said bank. Among other things, Bierce pleaded payment by Porter as indorser, since which time, he says, the note belonged to him; that the bank was not the owner of the note and not the real party in interest. There was trial to a jury and judgment for plaintiff. Defendant brings the case here and assigns for error that the judgment is contrary to law in that the undisputed evidence proves payment. There being no dispute about the facts, the question is one of law for the court. On this point the testimony discloses that on March 2, 1906, the note sued on was due, and, being unpaid, the bank sent Bierce this telegram:

"Memphis, Tenn., March 2, '06. W. W. Bierce, Oklahoma City, Okla.—Have you remitted to us for your note fifty-four

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hundred and sixteen (dollars) and sixty-eight cents indorsed by Porter, due today? State National Bank."

And received from him this answer:

"Oklahoma City, O. T., Mar. 2, '06. State National Bank, Memphis, Tenn., care Mr. Mfs.—Thought note due fifth. Have Mr. Porter take it up and draw on me with note attached. W. W. Bierce."

That pursuant thereto the bank thereupon sent said answer to Porter, who, being a director of said bank and president of the Gayoso Oil Works there in Memphis, sent back to the bank the check of said company drawn on said bank for the amount of said note and interest, in all $5,416.68, together with his draft:

"Memphis, Tenn., March 2, 1906. On demand pay to the order of State National Bank fifty-four hundred sixteen and 68-100 dollars, note and telegram March 2, attached, with exchange. Value received, and charge the same to account of J. K. Porter. To W. W. Bierce, Oklahoma City, O. T."

That upon receipt thereof said bank accepted said check, charged it to the account of said company, credited the "bills receivable" account with a like amount, and pursuant to its deposit ticket of that day, which referred to the drafts as "checks, $5,416.86," on the next day credited said company with the amount thereof and sent said draft, with the note attached, to Oklahoma for collection, through the New England National Bank of Kansas City, to whose account it was that day charged; that, when said check and draft were received by plaintiff, said note stood charged on its discount ledger in the account "notes discounted," at which time, under the column "when paid," the bank caused to be stamped on the line containing the entry of the note "March 2, 1906," and said note taken from said account and charged as stated. When, in response to said draft, Bierce wired:

"Oklahoma City, O. T., Mar. 8, 1906. H. G. Lennow, State National Bank, Memphis, Tenn.—Draft drawn by Jas. K. Porter refused on account of his indebtedness to me. Wm. W. Bierce"

—this suit was brought.

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While it is by plaintiff conceded, in effect, that the entries of charge and discharge made on its books at precisely the same time and in precisely the same manner show payment by check in precisely the same way by Porter of a certain individual note for the same amount due from him to the bank, it is insisted that the check of the oil company for the exact amount of the note sued, sent by Porter in this instance, did not pay this note, but that, when the bank received it, charged it to the account of said company, credited the "bills receivable" account with the amount, opposite the entry of said note and in the column "when paid" stamped "March 2, 1906," and, pursuant to the directions of Porter, sent the note off for collection attached to a draft on Bierce—that all of this indicated only that the note was taken out of "notes discounted" and placed in the remittance account for collection, and was not paid by Porter. Not so. When the bank accepted the check of the oil company and charged it to said company's account, which it did "March 2, 1906," the note sued on was paid by Porter. This the cashier was forced, in effect, to concede when he testified:

"Q. Read to the stenographer, by agreement, the amount of each individual check of the Gayoso Oil Works which were paid by the bank on that date. A. $302, $783.10, $200, $384, $250, $5,416.68, $5,416.68. Q. There was two checks of the Gayoso Oil Works for $5,416.68 each, paid on March 2, 1906, were there? A. There were. Q. Did you know what these checks were for? A. I do not. Q. Referring again to your Journal VV, a portion of which has been offered in evidence, I will ask you to state if it is not probable that these two checks of $5,416.68 each correspond to the two amounts on that Journal VV, showing bills receivable, payable that day of W. W. Bierce, $5,416.68, and of James K. Porter for $5,416.68, the Bierce note being indorsed by Porter? A. They do. Q. So that the note sued on was paid to the bank by the check of the Gayoso Oil Works for the $5,416.68? A. I do not know about that. Q. Can you inform the court of any other possible asset to the bank which these two checks could have been used to take up except these two notes shown on your Journal VV, a portion of which has been offered in evidence? A. I do not know of anything else. Q. Then, according to your best judgment, the note sued on was

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paid by the Gayoso Oil Works on March 2, 1906? A. I don't know. I suppose this is the amount."

But, whether conceded or not, the legal effect of accepting the check and charging it to the account upon which it was drawn operated as payment of said note. When the bank received instructions from Bierce to "have Porter take it up and draw on me with note attached," it could have ignored the request. It did not do so, but sought therewith to comply. Pursuant thereto it sent said telegram to Porter, who, in turn, could have ignored it, but did not, and both co-operated to comply with the request. To this end, and for no purpose other than to carry it out, Porter sent to the bank the check of the oil company drawn for the precise amount of the note and interest with this draft:

"Memphis, Tenn., March 2, 1906. On demand pay to the order of State National Bank fifty-four hundred sixteen and 68-100 dollars, note and telegram March 2, attached, with exchange. Value received, and charge the same to account of J. K. Porter. To W. W. Bierce, Oklahoma City, O. T."

Nothing could be plainer than that in so doing Porter thereby impliedly requested the bank to accept the check in payment, charge the same to the account of the oil company, discharge the note from its then account, attach it and Bierce's telegram to said draft, and send the same off for collection. The books of the bank show that said check was by it accepted in that it was charged to the company's account. This was, in effect, as if Porter had presented to the bank the check in person, received the money on it, and paid it back again in liquidation of the note. Or as stated in 2 Morse on Banks & Banking, sec. 451:

"A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given."

Or as stated in 30 Cyc. 1207:

"The acceptance by the creditor of a check, without regard to whether it is the check of the debtor or of a third person, does not constitute payment unless it is agreed that it shall be

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taken as an absolute payment. * * * But, where the check is in fact paid, the debt is extinguished. * * *"

See, also, *Pratt v. Foote,* 9 N. Y. 463, citing *Levy v. Bank of United States,* 4 Dall (Pa.) 234, 1 L. Ed. 814; *Bolton v. Richards,* 6 T. R. 338; *Mayer et al. v. Heidelbach et al.,* 123 N. Y. 332, 25 N. E. 416, 9 L. R. A. 850; *Lionberger v. Kinealy,* 13 Mo. App. 4; *Pickle v. Muse,* 88 Tenn. 380, 12 S. W. 919, 7 L. R. A. 93, 17 Am. St. Rep. 900; *Indiana Bond Co. v. Bruce,* 13 Ind. App. 550, 41 N. E. 958; *Hooker, App., v. John Burr et al.,* 137 Cal. 663, 70 Pac. 778, 99 Am. St. Rep. 17; *Sage et al. v. Burton,* 84 Hun, 267, 32 N. Y. Supp. 1122; *Patterson v. Wilson et al.,* 101 N. C. 584, 8 S. E. 229; *Smith Roofing, etc., Co. v. Mitchell,* 117 Ga. 772, 45 S. E. 47, 91 Am. St. Rep. 217.

Pratt v. Foote, supra, was an action by plaintiff, as president and sole owner of the Plattsville Bank, against the defendant, as maker of a promissory note dated December 9, 1846, for $1,015.89 and interest. The defense was payment. There was judgment for plaintiff. On review the court of appeals declared the law to be that, where there was no conflicting evidence, as in that case, the question of payment was one of law for the court on the undisputed facts. See, also, *Winfield Nat. Bank v. McWilliams,* 9 Okla. 493, 60 Pac. 229. The undisputed facts were that in the fall of that year defendant borrowed $1,000 of Samuel Scudder for which he gave his note payable at said bank. Scudder indorsed the note and discounted it to said bank. The note matured November 20th. Before it became due defendant, being prepared to pay it, gave Scudder the money and received from the latter his check for the amount dated November 20th; on the 15th defendant called at the bank and proposed to exchange said check for said note, which was declined, but the cashier told him that he might indorse the check and leave it, and if, when it became due, it was made good, it would pay the note. Said check was accordingly left; neither check nor note was protested. On the day they became due, Scudder's account was overdrawn. Prior to the 25th several thousand dollars were entered to his credit, but on that day the same remained overdrawn some $2,000. On the 25th the de-

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fendant's note was entered on the books of the bank as having been paid, and Scudder's check was charged to his account. All entries made upon the payment of a discounted note were made on that date. Between that date and December 9th Scudder failed. On December 9th defendant called at the bank and asked if his note and check had been paid. He was told that neither had been paid and that Scudder had not made good, but no information was given him concerning the entries in the books. He thereupon gave plaintiff the note upon which the instant suit was brought and received said original note and check. It was insisted that the charging of Scudder's check to his account "* * * did not extinguish the note, because the original agreement to receive the check in payment, made when it was deposited, was conditional, and the conditions were never fulfilled, and it does not appear that any subsequent agreement was ever made." But the court held not so, and said:

"* * * When the bank upon which a check is drawn accepts it upon its own debt, the same act of acceptance pays the check to the payee and the debt to the bank. Instead of paying the money upon the check, the bank cancels the debt; it is the same, in effect, as if the money was first paid to the payee of the check and instantly repaid to the bank. There can be no necessity, in such a case, for showing an express agreement to accept the check in payment; the transaction is *per se* a payment. So far as any agreement is necessary, it arises, by implication, from the acts done. The force of the entries in the books of the bank is in no degree impaired by what took place when the note was left by the defendant. The cashier refused then to receive the check unless the account of Scudder was made good. But this was a consideration in which the bank alone was interested; the defendant had no motive to insist upon this condition; hence the bank might waive it at will. The subsequent acceptance of the check by the bank, as shown by the entries in their books, was *ipso facto* a waiver of the conditions previously insisted upon. The bank had no authority to take the check and charge it in their account upon any other terms than as payment. They had the request of the defendant to receive the check in payment of the note, and in no other way. This request, made when the note was left, had never been withdrawn; when the bank consented to receive the check, therefore, it must be presumed to have received it upon the terms of the request.

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* * * What more was necessary to constitute an agreement than that the bank should waive its objection and finally accede to the request of the defendant by accepting the check? This the bank did. Here, then, was a proposition on one side and an assent upon the other, which is all that is necessary to make a valid contract. The bank could no more recede from this than from any other contract. It did not require the subsequent assent of the defendant to the application of the check to complete the agreement, because that assent preceded the act of the bank in accepting it. There was then, in this case, all the agreement which is necessary to cause the acceptance of the check to operate as a payment of the note"

—and reversed and remanded the case.

In *Mayer et al. v. Heidelbach et al., supra,* the court said: "I do not find that the doctrine of *Pratt v. Foote* has ever been questioned or overruled."

But from this it does not follow that the bank did not rightfully prevail in the trial court. This for the reason that this evidence was insufficient and did not tend to establish a defense. The payment of the note by Porter as indorser did not satisfy the debt of Bierce, the maker. He owed it as before. By that payment Porter became equitably entitled to be substituted to the rights and remedies of the bank and nothing more. The bank remained the legal holder of the note, and as such entitled to recover of Bierce the full amount thereof. In other words, the plea of payment by Porter as indorser, was bad, and proof of a bad plea constitutes no defense.

Jones et al. v. Broadhurst, 9 M. G. & S. 173, was one of the earliest and leading cases on this point. It was there held that satisfaction of a bill as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not necessarily inure as a satisfaction on behalf of the acceptor or operate to discharge him from liability to the indorsee. In that case the declaration charged the defendant as the acceptor of a bill of exchange drawn by W. & C. Cook payable to their order three months thereafter and indorsed by them to plaintiffs. One of the pleas alleged that after said indorsement and before suit the drawers had delivered and plaintiffs had accepted certain personal property in full discharge of the bill and damages, since

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which time the bill had been held by plaintiff and action prosecuted thereon contrary to the consent of the drawers. After plaintiffs had replied *de injuria,* there was trial of the issue joined on the plea, which resulted in a verdict for defendant. After which defendant was called on to show cause why judgment should not be entered for plaintiffs *non obstante veredicto* on account of the insufficiency of the plea. The question raised by the plea was whether satisfaction of a bill as between a drawer or indorser and an indorsee, made before or after the bill became due, inures as a satisfaction on behalf of the acceptor and operates to discharge him from liability to the indorsee. The court held that such it did not do, and was of opinion that the plea as proved and sustained by the verdict did not show sufficient matter to bar the plaintiffs, and made the rule absolute. The court said:

"The terms of the plea do not import that the satisfaction was made upon any contract or condition, either that the bill should be delivered up, or be deemed to be satisfied as between the plaintiffs and the acceptor; and, when the nature of the relation in which the respective parties stand towards each other is considered, no principle is apparent upon which, as a consequence in law, the satisfaction of a bill as between the indorsee and the drawer should operate as a satisfaction and discharge in favor of the acceptor. Supposing the effect of the plea to be that the plaintiffs are suing as trustee for the drawers, but against their consent, such matters would furnish no legal bar to the plaintiffs, as the law can take no notice of the trust, nor, consequently, whether the trustee is enforcing his legal rights against a third person with or against the consent of his *cestui que trust.* And we are of opinion that the defendant has not established any legal principle which will entitle him to judgment upon this plea."

See, also, *President, etc., v. Hazard,* 13 Johns. (N. Y.) 353; *Madison Square Bank v. Pierce,* 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751; *Linney v. Thompson et al.,* 3 Kan. App. 718, 45 Pac. 456; *Manley, Ex., v. Park,* 68 Kan. 815, 75 Pac. 1134, 66 L. R. A. 967; *Greene v. McAuley,* 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308.

In *Madison Square Bank v. Pierce, supra,* the defendant Pierce made his promissory note payable to his own order and

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indorsed to the Bates Company, Limited, which indorsed it to the bank for value. Thereafter said company became insolvent, and its receiver paid the bank upon the liability of the indorser some 70 per cent. of the amount secured by the note. Later the bank sued Pierce, the maker, and recovered judgment for the full amount of the note, notwithstanding the proof showed said payment by the receiver and in spite of the claim as asserted by defendant that she should only be held liable for the balance remaining unpaid. This judgment by the general term was affirmed by the Court of Appeals on the authority of *Jones v. Broadhurst, supra,* the court holding Pierce to be the ultimate debtor and the party who ought to pay the note, both in discharge of the obligation to the holder and in exoneration of the indorser; that, when the bank sued on the note, it was the legal holder and the legal party in interest; that, upon the production of the note and the usual proof, judgment against the maker for the full amount was inevitable unless some defense was interposed; that, to the extent of the money then paid, the indorser became equitably entitled to be substituted to the rights and remedies of the holder and *pro tanto* was the beneficial owner of the debt, but that a court of law could not split the note into parts, but must act upon the legal interest and ownership—citing *Guernsey v. Burns,* 25 Wend. (N. Y.) 411, and *Callow v. Lawrence,* 3 Man. & Sel. 95. And this, too, under a statute requiring substantially as ours that the action must be prosecuted by the real party in interest. Bliss, Code 1890, sec. 449; N. Y. Code Civ. Proc. 1852, sec. 411.

Being in rightful possession and owner of the legal title to the note, the bank is the real party in interest, and the equities existing between Porter and the bank were immaterial so far as Bierce is concerned.

In *Linney v. Thompson et al., supra,* the only question involved was the right of the plaintiff to maintain an action upon a negotiable promissory note executed by defendants payable to Culp and by him indorsed to McDonald and by him indorsed to plaintiff. The defense was that plaintiff was not the owner of

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the note nor the real party in interest, and the jury so found. In reversing the cause the court said:

"Apart from the question of jurisdiction, can the plaintiff maintain this action? We think he can. Being a negotiable note, McDonald's indorsement vested the plaintiff with the legal title thereto. In law, for the purpose of suing thereon, that made him owner. If transferred after maturity, as is claimed, it would be subject, in the hands of the plaintiff, to all equities and defenses to which it was subject in the hands of McDonald. For the purpose of establishing two of the defenses set up—a failure of consideration, and a material alteration of the note—the defendants had the right to show that the plaintiff took the note under circumstances which would make such defenses available against him. Beyond that, however, it was immaterial to inquire. Whatever cause of action existed was, by the indorsement and transfer of the note, vested in the plaintiff. The payee and C. W. McDonald, the plaintiff's indorser, being parties to the action, were concluded by any judgment rendered therein. It is no concern of the defendants to whom they pay the note, or with whom they adjudicate the questions arising concerning it, if such payment or adjudication relieves them from all responsibility to every other person. It does not matter that the plaintiff may have paid nothing for the note, or that McDonald may expect eventually to receive the money collected thereon. Being legal owner of the instrument, the plaintiff is in law 'the real party in interest,' and may sue thereon in his own name. Any other rule would permit the maker of a note, as against an indorsee and holder, to introduce questions entirely foreign to the merits of the cause, and to obtrude inquiries regarding the business dealings of other persons which in no wise concern him or affect his rights in litigation. This is especially true with reference to an action upon a negotiable note, brought by one having possession thereof under regular indorsement from the payee to him. While some decisions apparently hold to the contrary, the great weight of authority recognizes the right of the indorsee and holder of a negotiable note to maintain an action thereon, in his own name, against the maker, without regard to the equities and relations existing between such indorsee and his indorser. *Brown v. Penfield,* 36 N. Y. 473; *Allen v. Brown,* 44 N. Y. 228; *Sheridan v. Mayor, etc.,* 68 N. Y. 30; *Elmquist v. Markoe,* 45 Minn. 305, 47 N. W. 970; *Mumford v. Weaver* (18 R. I. 801) 31 Atl. 1; *Spence v. Robinson,* 35 W. Va. 313, 13 S. E. 1004; *Tarbell v. Sturtevant,* 26 Vt. 513; *Caldwell v. Lawrence,* 84 Ill. 161; *Bassett v. Inman,* 7 Colo. 270, 3 Pac. 383; *Woodbury*

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v. Hinckley, 3 Colo. App. 210, 32 Pac. 860; Bliss Code, Pl. sec. 51."

In *Greene v. McAuley,* 70 Kan. 602, 79 Pac. 133, 68 L. R. A. 308, Greene sued McAuley on two notes for $130 each, executed by McAuley to Stearns, and assigned in writing by him to plaintiff. Defendant admitted their execution and assignment, but alleged that they belonged to Mrs. Thomas; that plaintiff did not own them and had no right to maintain the action. Upon the issue of ownership, the cause was tried to a jury and resulted in a verdict for defendant. The question involved was whether the evidence given on behalf of defendant tended to establish a defense. The facts were that in 1895 Greene signed a bond as surety for Mrs. Thomas in a proceeding in error to reverse a money judgment rendered against her in the district court. To insure him against loss on the bond, Mrs. Thomas gave him control of a piece of land and the right to retain the rents thereof as security until released from the liability; that, pursuant to said agreement, Greene in his own name rented the land for the season of 1897 to Sterns, who sublet to McAuley, receiving from him for the year's rent the two notes sued upon. Subsequently, being released from liability on the bond, he and Mrs. Thomas had a settlement. "Assuming," said the court, "that Greene, after promising that he would get the notes from Stearns and give them to her, procured Stearns to assign them to him, and then wrongfully kept them, having obtained them from Stearns in lieu of the payment of rent which was owing for the use of land belonging to Mrs. Thomas, but which had been made payable to Greene in order to secure him against liability from which he had now been released, do these facts constitute a defense in an action brought against the maker of the notes by Greene, not only without the consent, but against the objection, of Mrs. Thomas? In jurisdictions where, as in Kansas (*Manley v. Park,* 68 Kan. 400, 75 Pac. 557 [66 L. R. A. 967, 1 Ann. Cas. 832]; *Graham v. Troth,* 69 Kan. 861, 77 Pac. 92), the holder of the naked legal title to a promissory note may sue upon it, even though he may be under obligation to account to some third

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person for the entire proceeds, it is often said that in such an action the defendant cannot challenge the plaintiff's right to maintain it except by a showing of bad faith in the transaction. *Dyer v. Sebrell,* 135 Cal. 597, 67 Pac. 1036, and cases cited; *City Bank of New Haven v. Perkins,* 29 N. Y. 554, 86 Am. Dec. 332. In the decisions there is a somewhat singular lack of explanation, or illustration, as to just what might be considered bad faith in this connection. Doubtless the phrase is sometimes used with reference to a merely colorable transfer of title by the real owner to a stranger for the purpose of embarassing the maker of the note in his defense (*Marvin v. Ellis* [C. C.] 9 Fed. 367), but this example hardly meets the requirements of the situation, for it is also said that upon a showing that the plaintiff is only a nominal party, acting for the benefit of the real owner of the note sued upon, the defendant may avail himself of any defense that he could have interposed if he had been sued by the latter, and that his rights are protected, not by allowing him to question the plaintiff's capacity to sue, or by requiring the person finally interested to be made a party, but by permitting him to make his defense on the merits against the formal plaintiff. *Cottle v. Cole & Cole,* 20 Iowa, 481; *Salmon v. Independent Rural School Dist.* (C. C.) 125 Fed. 235; *Village of Kent v. Dana,* 100 Fed. 56, 40 C. C. A. 281; *Dickinson v. Bull,* 72 Ill. App. 75."

—and reversed and remanded the case, with directions to enter judgment as prayed in his petition. We are therefore of opinion that the bank, being the owner of the legal title to the note by indorsement, of right recovered, and that proof of the fact of payment by Porter, who (quoting from defendant's brief) "did not mean to cancel the obligation, but simply meant to pay as indorser, preserving the obligation as an outstanding one against Bierce," constituted no defense against a suit thereon by the bank. This was, in effect, our holding in *McNary et al., v. Farmers' National Bank, ante,* 124 Pac. 286, where we held that, where the payee of a promissory note assigns it to a third party as security for a loan and pays the loan pending the suit on collateral, the holder may nevertheless recover on collateral note from the maker, unless the latter is thereby deprived of some equity which

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he may have had against the payee. This for the reason that, notwithstanding such payment, he remained the legal owner and holder of the note.

Since in this action this note is subject only to the equities existing between Porter and Bierce—that is, to any defense that the latter might make if sued thereon by the former—the correctness of our holding in *Bierce v. State. Nat. Bk., etc.*, 25 Okla. 44, 105 Pac. 195, is apparent. There it seems that while, to the amount of the debt, the damage sustained by reason of the fraud and deceit alleged to have been practiced by Porter on Bierce might have been a proper defense if pleaded as a set-off to the note, the court was clearly right when it sustained a demurrer to a cross-petition which sought, not that, but to lodge a judgment in damages for tort for $31,000 against the bank by reason of such alleged fraud and deceit, from liability from which it was charged the bank, by collusion with Porter, sought to shield him. Believing, as we do, that plaintiff was entitled to a peremptory instruction, there is no prejudicial error in the instruction given or refused.

While it is true that the parties went to trial upon the issue of payment by Porter, which was erroneously found in favor of plaintiff, the plaintiff has not changed front in this court by contending, as it did in the court below, that, notwithstanding such payment by Porter, being the legal owner and holder of the note, it of right recovered, and that the judgment should be affirmed. This for the reason that the plea of payment by Porter was a bad plea, and consequently the issue thereon an immaterial issue. Precisely what was done, then, was that, in admitting the execution of the note and pleading such payment, defendant pleaded a confession and avoidance which in law did not avoid. When this is true, and the case comes here tried upon a bad plea resulting in an immaterial issue found in favor of plaintiff, this court will render and enter judgment for plaintiff where his petition states facts sufficient to constitute a cause of action. This for the reason that the court below would not have committed error in sustaining a motion for judgment on the pleadings in favor of plaintiff. *Life Association of America v. Cook*, 20 Kan. 19, cit-

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ing *Gaylord v. Stebbins,* 4 Kan. 42; *Douglas v. Rinehart,* 5 Kan. 393; *Reed v. Arnold,* 10 Kan. 103; *School Dist. v. Carter,* 11 Kan. 445.

In *Garland v. Davis,* 4 How. 131, 11 L. Ed. 907, an immaterial issue was joined on a mere matter of inducement. Unlike here, there was no confession and avoidance, and so the court reversed the cause for further proceedings in order that the parties might replead pursuant to the usual practice. Indicating the practice which should govern here, the court said:

"Thus, if a plea be bad, but still confesses the cause of action without setting out a sufficient avoidance, judgment can with propriety be rendered for the plaintiff on such confession, if the declaration be good. *Rex v. Phillips,* 1 Str. 397; *Jones v. Bodingham,* 1 Salk. 173; Gould on Pl. 509; *Simonton v. Winter et al.,* 5 Pet. 141 [8 L. Ed. 75]; *Kirtley v. Deck,* 13 Va. 388; 6 Mod. 10; Tidd. 827. So, if the plea be a mere nullity, putting nothing material in issue, judgment is at times allowed to be signed as for want of a plea, as if *nil dicit,* provided the declaration be good. 4 Taunt. 164; 2 Maule & Selw. 606. So, if the plea be evidently a sham plea, or fictitious, a like course is warranted. 10 East. 237; Tidd. 831. Or if the plea, though neither of these, still be defective, but sets out such facts as demonstrate that the party has no merits, and that no amendment could be made which would avail him anything, or, in other words, nothing is left in the case that can be amended. Gould on Pl. 514, sec. 39; Tidd. 831; *Henderson v. Foote,* 7 Va. 248."

Since there is nothing in these pleadings "that can be amended," there being no error in the record, the judgment of the trial court is affirmed.

All the Justices concur.

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DELAWARE COUNTY *ex rel.* CARVER *et al. County Com'rs,* v. HOGAN, *Sheriff, et al.*

No. 4125. Opinion Filed October 15, 1912.

Rehearing Denied November 15, 1912.

(127 Pac. 492.)

1. **MANDAMUS—Decisions Reviewable—Final Judgment.** From a final judgment of a judge of the district court made at chambers on a trial on its merits of an application for a writ of mandamus, appeal lies to the Supreme Court.

2. **COUNTIES — County Seat — Removal — "Place."** The word "place," as used in section 6, art. 17, par. 324, Williams' Ann. Const. Okla., means a definite locality, competent to be voted upon for the county seat of a county.

3. **SAME—Situation of Buildings.** A certain ten acres marked by metes and bounds, designated as a place and called Jay, was selected by the electors of a county as the location for the county seat. Thereafter the same, with other outlying contiguous territory, was duly incorporated in a town site, bearing the same name. The board of county commissioners of the county made a contract for the erection of a building commodious and suitable in all ways for the accommodation of the officers and public records of the said county which was located within the incorporated limits of the said town, and near to but not within the original ten acres denominated as a place at which had been located the county seat. **Held** that, on the refusal of the balance of the county officers to occupy with their records the said building so selected, mandamus would lie at the instance of the board of county commissioners to compel the same.

(Syllabus by the Court.)

Kane, J., dissenting in part.

Error from District Court, Delaware County; John H. Pitchford, Judge.

Mandamus by the County of Delaware, on the relation of W. E. Carver and Tom Dial, county commissioners, to George W. Hogan, sheriff of Delaware county, and others. From a judgment refusing the writ, relators bring error. Reversed and remanded, with instructions.

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Ad. V. Coppedge, Stuart, Cruce & Gilbert, and *Curtis & Pitchford,* for plaintiffs in error.

W. H. Korncgay and *E. B. Hunt,* for defendants in error.

DUNN, J. This case presents error from the judgment of the district court in and for Delaware county, denying plaintiffs in error a writ of mandamus in an action begun by them in said court. From the judgment, which was rendered by the judge at chambers within his district but in an adjoining county to the one wherein the case was filed, an appeal has been prosecuted by petition in error and case-made to this court.

On the oral argument the question was raised as to the jurisdiction of this court to entertain the appeal. That the same exists is in effect decided in the cases of *Wenner v. Board of Education of City of Perry,* 25 Okla. 515, 106 Pac. 821, and *Thompson et al. v. State ex rel. Cooksey et al.,* 25 Okla. 741, 108 Pac. 398. The judge of the district court at chambers had jurisdiction to try and determine the issues in the case presented, and the judgment which denied the relief demanded was final, from which an appeal lies to this court. Plaintiffs prosecute this case for Delaware county by virtue of being a majority of the board of county commissioners thereof. The defendants are the other officers of that county. The controversy arises out of the location of the county courthouse, or rather a building rented by the board to be used as such. In a contest over its location this court, May 28, 1911, rendered judgment declaring that a place called Jay had received the majority of the legal votes cast at an election held for the purpose of determining the permanent county seat of that county. *Town of Grove v. Haskell et al.,* 31 Okla. 77, 116 Pac. 805.

From the record it appears that the place called Jay was not a city or town, but was a plat of ground of ten acres, named and designated by its owners and submitted by them as a place as one of the competitors. It is made further to appear that prior to the time when the records and officers were removed from Grove, the temporary county seat, to such place, and on

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August 28, 1911, the board of county commissioners by resolution duly passed spread upon their records the following:

"Whereas, by virtue of law the county seat of Delaware county has been located at Jay in said county, and whereas it is necessary that arrangements be made to remove the offices, business, and records of said county from Grove in said county to Jay, and whereas, it is the duty of this board in the removal of the offices, business, and records of said county to place the same in such building or buildings in Jay, where the records may be protected from damage or destruction from fire, water, or other agencies, and whereas in the judgment of this board, at the present time there are no buildings in the town of Jay in which this board would be justified in permitting the records of this county to be placed therein for the reason that there are no buildings large enough and constructed in such a manner as to be reasonably fireproof to protect the important records of this county from loss or destruction by fire or other agencies, and whereas, one Wm. J. Creekmore has filed with the county clerk of this county his written proposal, which is set out in full above, and whereas under the terms of said proposal said Wm. J. Creekmore agrees upon certain conditions to erect and construct an adequate building in the incorporated town of Jay, in which the county offices and records of this county may be moved with safety and with practically no danger of loss by fire or water, and whereas it appears to us and in our judgment that it is to the best interest of the taxpayers of this county that this board accept said proposal and enter into the same as an agreement between Delaware county and the said Wm. J. Creekmore: Now, therefore, be it resolved that we, the board of county commissioners of Delaware county by virtue of the power and authority conferred upon us by the laws of this state, do hereby accept said proposal and the terms and conditions thereof, hereby agree, bind, and obligate ourselves and the county of Delaware to take possession and lease the said parts and portions of said building when the same is completed for the purpose of locating therein the offices, business, and records of said county."

Thereafter it appears that the said place was, with certain adjoining territory, known as the Creekmore addition, incorporated as a town and named Jay. The proceedings before the board of county commissioners for that purpose were held on the 6th day of November, 1911. It seems that, after the decision above mentioned, the records of the county and county officers

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were removed from the town of Grove to that portion of the town of Jay embraced within the ten acre plat. Thereafter, and on the 24th day of January, 1912, the board passed and spread upon its records the following resolution:

"Be it known that on this 24th day of January, 1912, the following resolution was offered by Thomas Dial, a member of the board of county commissioners of Delaware county, state of Oklahoma: Be it resolved by the board of county commissioners that whereas, Jay has been named as the permanent county seat of Delaware county, and whereas, a place where said records are now located is an unsafe place and not fit for the regular work of the officers of the county, and whereas, the records as now located are in danger of being lost or destroyed, that said records shall be located in Jay and in the concrete building situated on lots 1 and 2 in block 32 in the Creekmore addition to Jay, and the sheriff of said Delaware county is hereby directed to move and assist in moving said records from the place where they are now located in Jay to said building. It is further resolved that these minutes be spread upon the records and they shall be authority and direction to the sheriff to make said removal."

It appears that, in accordance with the contract made and the foregoing resolution, the records were removed to the said concrete building, which was within the corporate limits of the town, but not on said ten acres. Thereafter the Adjutant General of the state, acting under and by virtue of an order issued by the Governor of the state, removed the said records from the said building and returned them to the place where they had been originally taken by the officers on their removal from Grove. Proceedings thereafter taken in reference to the said order and action of the Adjutant General are reported in the case of *Fluke et al. v. Canton*, 31 Okla. 718, 123 Pac. 1049. The present action was thereafter begun on the 9th day of May, 1912, by a majority of the board of county commissioners praying that a writ of mandamus be directed to these defendants, being the other officers of the said county, commanding and requiring them to move to the concrete building selected by the said board and establish therein their offices, and there to take with them the records and paraphernalia of every kind pertaining thereto. It is on ac-

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count of the denial of the said writ by the judge of the district court that this action is prosecuted.

It is contended by counsel for plaintiffs that the board of county commissioners were acting within the authority conferred upon them under the terms of section 1684, Comp. Laws 1909, in passing the resolutions, and in selecting the building which was selected. The statute upon which they rely is quoted at length in their brief, and is as follows:

"In any county where there is no courthouse or jail erected by the county, or where those erected have not sufficient capacity, it shall be the duty of the said board of county commissioners to provide for court room, jail, and offices for the following named officers: Sheriff, treasurer, register of deeds, county clerk, county attorney, superintendent of public schools, and judge of probate, to be furnished by the county in a suitable building or buildings, for the lowest rent to be obtained at the county seat, or to secure and occupy suitable rooms at a free rent within the limits of the county seat or any of the additions thereto, until such county builds a courthouse."

The criticism made by counsel for the defendants upon the existence of the power here sought to be exercised is that the buildings to be selected must, under the authority granted, be within the limits of the original ten acres; also, that under and by virtue of section 6, art. 17, of the Constitution, the towns named as county seats of the different counties of the state were to be and remain the county seats of the respective counties until changed by a vote of the qualified electors of the county, and that, where this was done, the town which received a majority of all the votes cast at the election should be thereafter the county seat; and, in view of the fact that at the election held the place called Jay received a majority of the votes cast, that the same thereupon became the county seat, and the board of county commissioners lacked the authority to contract for the use of any building outside of those limits, for the reason that this constituted a change of the county seat. The argument based on the foregoing objections all goes to the proposition of the location of the permanent courthouse for the county. That situation is not involved in this controversy. The county not having erected any courthouse or jail, and having no building within the ten acres

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denominated a place, at which by a vote of the electors of the county the county seat was located, was compelled by force of circumstances to provide for a suitable building for the temporary use of the county officials. So far as the original ten acres is concerned, under the resolutions passed by the board, there is no building there that can be occupied. This being true, we think under the power given in the statute quoted that the board had the authority to provide for renting the building in question and for its occupancy as temporary quarters for the county officials. This building, although not located within the limits of the ten acres, is located at or near it and within the incorporation of the town, which embraces the ten acres. The latitude allowed by the statute was provided, in our judgment, to meet just such contingencies as have here arisen. This construction and conclusion on our part is in keeping and in harmony with the apparent policy and object of the Legislature in framing this statute, and our duty under these circumstances is as stated by this court in the case of *State ex rel. Lee v. Chaney et al.*, 23 Okla. 788, 102 Pac. 133, to be that:

"A court in construing a statute or a provision of a Constitution should adopt that sense which harmonizes best with the context, and which promotes in the fullest manner the apparent policy and object of the Legislature or the framers. *Nance v. So. Ry. Co.* [149 N. C. 366], 63 S. E. 116; *Commonwealth v. Kimball*, 24 Pick. [Mass.] 370."

The judgment of the judge of the district court is accordingly reversed, and the cause is remanded, with instructions to set the same aside and enter one in accordance with the views expressed in this opinion.

TURNER, C. J., and HAYES, J., concur; WILLIAMS, J., not participating. KANE, J., dissents from the reasoning.

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In re APPLICATION OF STATE TO ISSUE BONDS TO FUND INDEBTEDNESS.

No. 4125. Opinion Filed November 15, 1912.

(127 Pac. 1065.)

1. **STATES—Creation of Debt—Constitutional Limitations—Application.** The limitations of section 23, art. 10, Williams' Ann. Const. Okla., were not intended to apply to that class of pecuniary obligations arising out of the ordinary necessary current expense of maintaining the state government, and which were in good faith intended to be paid, and were lawfully payable, out of the current yearly revenues, and other resources of the state, for the fiscal year within which such obligations were incurred.

2. **STATUTES—Repeal—Implication.** The law does not favor repeals by implication; and where a subsequent statute deals fully with part of the subjects embraced within a former one, but makes no mention of other subjects fully provided for in the former statute, such subjects not mentioned in the later act are not repealed by implication.

3. **STATES—Indebtedness—Refund—Statutes—Repeal.** Sections 372 to 381, inclusive, Comp. Laws 1909, furnish authority and procedure for refunding the outstanding legal warrant indebtedness of the state, and said sections, in so far as they relate to refunding state indebtedness, were not repealed by implication by the subsequent enactment of sections 408 to 421, inclusive, Comp. Laws 1909.

4. **SAME—Fiscal Management — Deficiencies—Constitutional Provisions.** The provisions of section 3, art. 10, Williams' Ann. Const. Okla., for paying deficiencies, which may arise during any fiscal year, where the ordinary current expenses of the state exceed its income from current taxation and other resources, is not exclusive.

5. **SAME—Warrants—Refunding—Bonds.** Section 377, art. 1, c. 8, Comp. Laws 1909, governs the time and manner of payment of bonds of the state issued for the purpose of refunding the character of warrants involved in this suit.

(Syllabus by the Court.)

Carmichael and Harrison, Special Justices, dissenting.

Error from District Court, Oklahoma County; W. R. Taylor, Judge.

Application by the State to determine the existence, character, and amount of the legal outstanding indebtedness of the State,

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and to issue funding bonds therefor. From a decree sustaining protests, petitioners bring error. Reversed and remanded.

Chas. West, Atty. Gen., for petitioners.

Wright & Blinn, for protestants.

BREWER, SPECIAL JUSTICE. This is a proceeding brought in the district court of Oklahoma county by the state, through the Governor, Secretary of State, and the State Treasurer, for the purpose of refunding certain outstanding state warrants, alleged to be legal and valid, aggregating an amount somewhat in excess of $2,000,000. These warrants, it is made appear, were issued from time to time, principally during the fiscal year ending June 30, 1911, in payment of the ordinary current expenses of maintaining the state government, and pursuant to valid legislative appropriations of the current revenues of the state, for which provision had been made by a levy of a tax, which, in addition to revenue derived from other sources, was believed to be sufficient to meet the appropriations against which the warrants were drawn.

It is alleged that the state has no funds with which to pay these warrants, and desires to fund the same by issuing its negotiable bonds, pursuant to law, and that its plan of refunding is agreeable to the holders and owners of the warrants. At the hearing certain citizens of the state filed protests raising the following legal questions: (1) That to issue funding bonds in excess of $400,000 would be in violation of section 23, art. 10, of the Constitution. (2) That article 7, Comp. Laws 1909, containing sections 408 to 421, inclusive, is a general act and repeals article 1, c. 8, Comp. Laws 1909, containing sections 372 to 381, inclusive, and therefore there is no lawful authority to fund or bond the indebtedness. (3) That section 3, art. 10, of the Constitution, and certain legislative enactments, provide for the payment of these warrants by the levy of a tax. (4) That to issue said bonds for a serial period as proposed in this proceeding would be in violation of section 4, of article 10 of the Constitution. (5) Revenue levied and collected for defraying expenses of state government for the fiscal year ending June 30, 1911,

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cannot be applied to the payment of indebtedness accruing in a previous fiscal year.

The protests were treated as a demurrer in the court below and were sustained, and the right to refund the said warrant indebtedness was denied, to reverse which action and holding of the court this proceeding in error was commenced.

Whether the issuance of the proposed bonds is in violation of the section of the Constitution invoked depends upon whether or not issuing warrants or the incurring of obligations for the payment of the ordinary current expenses of maintaining the state government against legislative appropriations therefor, and within the estimated amount of the current revenues of the state, provided for the year in which the warrants are issued, is the creation of an indebtedness within the meaning of that section. Section 23, art. 10, Williams' Ann. Const. Okla., is as follows:

"The state may, to meet casual deficits or failure in revenues, or for expenses not provided for, contract debts; but such debts, direct and contingent, singly or in the aggregate, shall not, at any time, exceed four hundred thousand dollars, and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained or to repay the debts so contracted, and to no other purpose whatever."

Section 24 of the same chapter empowers the state to contract debts to repel invasion, etc., and section 25 provides that:

"Except the debts specified in section twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this state, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and have a majority of all the votes cast for and against it at such election. On the final passage of such bill in either House of the Legislature, the question shall be taken by yeas and nays to be duly entered on the journals thereof, and shall be: 'Shall this bill pass, and ought the same receive the sanction of the people.'"

The contention made here by those opposing the issuance of bonds, boldly stated, and stripped of its verbiage, is in its legiti-

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mate effect that all the outstanding warrants of the state, no matter for what purpose issued, in excess of the limit named in section 23, art. 10, are void, and that, therefore, the state, not owing them, cannot issue bonds to pay them, as that would be the creation of a debt in violation of said limitation. If the state does not owe them already, or rather the sums they represent, then the contention is sound. On the other hand, if these warrants were issued legally, under the authority of other provisions of the Constitution, and laws in harmony with such provisions, and at the time of issue did not impinge upon that section—that is, if they were legal, and represented valid obligations in their inception, not inimical to that section, and the mere fact that, without fraud, and contrary to the reasonable provisions made by the officers for revenue, and contrary to their honest expectations, a failure of the anticipated and provided revenue prevents their payment— then can it be said that section 23, not operative at the time of their issue, becomes operative now, and makes that now invalid which when issued was valid? The language of section 23, read alone, and without considering other sections of the Constitution, is capable of such a sweeping construction. But it is a fundamental rule of construction that, to determine the meaning and scope of one provision of an act, it must be read in the light of, and with due regard for, other provisions of the act. A provision, however, is not always held to mean what its exact letter may imply where to so hold would be unreasonable or bring about an absurd result or would render nugatory other provisions. The old illustration of blood-letting in the streets is familiar to every lawyer. A statute provided that prisoners who escaped from jail should be hanged, but, when the prison caught fire and the prisoners escaped, the court did not sentence them to be hanged, and said that it was unreasonable that a man "should be hanged because he would not stay and be burnt."

It is well to remember that the state was created by the people to perform for them certain functions, and the necessity for the performance of these functions is the sole and only object of the creation of the state. The Constitution provides for a

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Governor and the various other administrative officers of the state and prescribes the salaries they shall receive; for a legislative department, fixing the compensation of the legislators. It provides for a judicial system, stipulating the salary of the judges. These departments and co-ordinate branches of government are impotent in the performance of the various duties made mandatory by the Constitution, and necessary for the protection and well-being of the people, without other necessary subordinate officers, and the equipment and facilities needed in performing their required duties. It acknowledges it a duty to care for and maintain the insane and feeble-minded, and that the convicted criminals shall be restrained from going at large and preying upon and terrorizing society. It also provides for a free public school system, including higher education, and for the establishment and support of institutions for the care and education of the deaf, dumb, and blind. The maintenance of these things is absolutely necessary under any humane and modern system of government and they are not only pledged by the Constitution, but are ordained and established by its mandatory terms.

In this day of enlightened thought there is much controversy among students of government as to the proper and necessary limitations upon the powers of government; but it is now beyond the stage of controversy, agreed to and admitted by all learned men, that certain necessary and fundamental functions of government must always be expressed and actively exercised. The duty of protecting life, liberty, and property, and preserving peace and order cannot be delayed, nor can the power so to do be abdicated without the destruction of the state. These functions are elementary and indestructible. To say that warrants issued in payment of services and supplies under the express and necessarily implied commands of the other sections of the Constitution, to be paid out of cash in the treasury or current funds in process of collection, are in violation of section 23, as to any sum in excess of the limitations, is to subordinate these other sections of the Constitution to this one. It would render some of them contradictory or nugatory; and is a construction we do not believe was ever intended. To so construe it would mean that the section which

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says that the Governor shall be paid $4,500 a year for his services must then be construed to mean only that the state will pay him this sum provided that it has the money, or does not already owe $400,000 for other things it has received at the time payment for his services is due.

These provisions are not peculiar to the Constitution of this state. The same, or provisions of similar import, are found in many of the later Constitutions. They have been reviewed and considered by the courts of the various states from many different angles, and under many different situations, but in our examination we have failed to find any case involving the identical conditions presented here. We do find, however, where constitutional provisions limiting the debt-creating power of municipal subdivisions of the state have been construed, in many cases, in relation to the extent of such limitations on the creation of indebtedness in the carrying on of the ordinary governmental functions. The language of these provisions is quite as absolute and sweeping as is that of the section of our Constitution under consideration. A fair example of these provisions is found in section 26, art. 10, of our Constitution, which provides that:

"No county, city, town, township, school district, or other political corporation, or subdivision of the state shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year without the assent of three-fifths of the voters thereof, voting at an election to be held for that purpose," etc.

The authorities we shall cite and review will therefore, while dealing with municipal indebtedness, be equally applicable and in point in principle in dealing with state indebtedness.

It is frankly conceded that the adjudicated cases on this question are not in harmony. When these provisions first came before the courts, there was a decided tendency towards a strict construction of the language employed, and in many of the earlier cases they were held to include within their operation debts and liabilities for the ordinary current expenses of the municipal government. *Springfield v. Edwards,* 84 Ill. 626; *Law et al. v. People ex rel.,* 87 Ill. 388; *Fuller v. Chicago et al.,* 89 Ill. 282; *Prince v. City of Quincy,* 128 Ill. 443, 21 N. E. 768; *Chicago v.*

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McDonald, 176 Ill. 404, 52 N. E. 982. Illinois and other states still hold to this construction, but in a great majority of the states, where such limitations exist, it is held that, although the current expenses of a municipality for salaries of officers, court expenses, and other obligations arising in the conduct of municipal affairs create what is technically a debt until paid, yet, these expenses being intended in universal practice to be paid from cash in the treasury or from current revenue, that the power of the municipality to incur debts of this nature is not affected by the debt-limiting provisions of the Constitution. To illustrate, we quote from a few of the many decisions sustaining the above. In *Grant v. Davenport,* 36 Iowa, 396, in discussing a constitutional provision, "no county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose," etc., the court says:

"When a contract made by a municipal corporation pertains to its ordinary expenses, and, together with other like expenses, within the limit of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts."

And Justice Gordon, of the Pennsylvania Supreme Court, in *Appeal of City of Erie,* 91 Pa. 398, quotes the above language from the Iowa court, and adds:

"This we hesitate not to say is a sound constitutional interpretation, and in a similar case might well be adopted in the construction of our own Constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created."

And in the case of *Johnson v. Board of County Commissioners,* 7 Okla. 686, 56 Pac. 701, the Supreme Court of Oklahoma Territory, speaking through Justice Hainer, quotes with approval the following from the Supreme Court of South Dakota (*Town Lot Co. v. Lane,* 7 S. D. 1, 62 N. W. 982):

"The fact that a municipality is indebted to the full constitutional limit does not prevent the same from levying such taxes as

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it is authorized to levy by law, and issuing its warrants, within the limits of such levy, in anticipation of their collection; and, so long as the warrants issued are within the amounts lawfully levied, they do not create an additional debt. To render such warrants invalid, it must affirmatively appear therefore that no tax had been provided for their payment when the warrants were issued."

Sackett v. City of New Albany, 88 Ind. 473, 45 Am. Rep. 467; *Valparaiso v. Gardner,* 97 Ind. 1, 49 Am. Rep. 416; *Brashear v. Madison,* 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; *Foland v. Frankton,* 142 Ind. 546, 41 N. E. 1031; *Board of Commissioners of Perry Co. v. Gardner,* 155 Ind. 165, 57 N. E. 908; *Grant v. City of Davenport,* 36 Iowa, 396; *French et al. v. City of Burlington,* 42 Iowa, 614; *Tuttle v. Polk et al.,* 92 Iowa, 433, 60 N. W. 733; *Creston Waterworks Co. v. City of Creston,* 101 Iowa, 687, 70 N. W. 739; *City of Cedar Rapids v. Bechtel,* 110 Iowa, 196, 81 N. W. 468; *Adams v. City of Waterville,* 95 Me. 242, 49 Atl. 1042; *City of Alpena v. Kelley,* 97 Mich. 550, 56 N. W. 941; *McGrath v. Grout,* 171 N. Y. 7, 63 N. E. 547; *Darling v. Taylor,* 7 N. D. 538, 75 N. W. 766; *Reuting v. Titusville et al.,* 175 Pa. 512, 34 Atl. 916; *Addyston Pipe & Steel Co. v. City of Corry,* 197 Pa. 41, 46 Atl. 1035, 80 Am. St. Rep. 812; *Shannon v. City of Huron,* 9 S. D. 356, 69 N. W. 598; *In re State Warrants,* 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; *Western Town Lot Co. v. Lane,* 7 S. D. 1, 62 N. W. 982; *Rauch v. Chapman,* 16 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. Rep. 52; *Hull v. Ames,* 26 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743; *Gladwin v. Ames,* 30 Wash. 608, 71 Pac. 189; *Herman v. City of Oconto,* 110 Wis. 660, 86 N. W. 681.

It must be noted, however, that the authorities recognize a distinction in the character of the obligation incurred, where the same is to be paid out of the revenues of future years. The test of this distinction is whether the obligation is within the ordinary and necessary current expense and essential to its regular corporate business and the performance of its ordinary governmental functions. If not, such obligations, intended to be a charge upon the revenues of future years, are regarded as debts within the meaning, and therefore violative of the constitutional limitations. This principle is applied in the case of *Campbell v. State,*

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23 Okla. 109, 99 Pac. 778. On the other hand, it has been held by many courts and with the approval of the Supreme Court of the United States in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, that although the obligation may involve a charge against the revenues of future years, if they are for absolute necessities, things essential to the health and welfare of the people, and which it is contemplated by the law that the municipality, in the exercise of its delegated governmental powers, should furnish from day to day and from year to year, for the ordinary and necessary well-being of its people, then such obligations do not constitute debt within the meaning of the constitutional limitation. This question has been frequently raised in contracts by a municipality for the payment of an annual sum for water and light, extending through a period of years, and to be paid out of the revenues of such years. And while we disclaim any purpose of committing this court to the doctrine of these cases, as regards the charges upon the revenues of future years, yet we cite them for the reason that it is believed no sound or logical reason can be advanced for their decision except that necessary current expense is not thought to be within the intention of the constitutional limitations. *Territory v. Oklahoma City*, 2 Okla. 158, 37 Pac. 1094; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Walla Walla v. Walla Walla Water Co. et al.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Id.* (C. C.) 60 Fed. 957; *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; *Ludington Water Supply Co. v. City of Ludington*, 119 Mich. 480, 78 N. W. 558; *City of Joseph v. Joseph Waterworks Co.*, 57 Ore. 586, 111 Pac. 864, 112 Pac. 1083; *Brown v. City of Corry*, 175 Pa. 528, 34 Atl. 854; *Dallas Elect. Co. v. Dallas*, 23 Tex. Civ. App. 323, 58 S. W. 153; *Tyler v. Jester*, 97 Tex. 344, 78 S. W. 1058; *McNeal v. City of Waco*, 89 Tex. 83, 33 S. W. 322.

From an examination of the foregoing, and many other authorities which could be cited, it will be seen that the courts have found that it is necessary, not only to consider the language used in a section, but to also consider the practical situation to which it is intended to apply, in connection with the other

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sections of the Constitution, and to the end that all may be given the proper and logical effect intended by the lawmakers. As has been seen, our Constitution requires the performance of many distinct governmental functions day by day and year by year, so, when this provision is construed as not intending necessary current expense in good faith provided for within its limitations, it merely means that this section shall not be so applied as to defeat the other provisions, providing for the continued existence of the government, through the continuous performance of its governmental duties. It may be added that our Constitution was written and adopted long after similar provisions in other Constitutions had been construed by the courts; and it may be assumed that the framers of that document and many of our citizens were familiar with those decisions at the time it was written and adopted. We therefore feel constrained to follow the construction placed on practically the same language by so many of the states before we incorporated it into our own Constitution.

Section 2, art. 10, Williams' Ann. Const. Okla., provides for maintaining the state government by an annual tax, which with other resources shall be sufficient to meet the estimated ordinary expense for each fiscal year. The only limitation on this amount (section 9, art. 10) is that it shall not exceed in any one year three and one-half mills on the dollar for state purposes. Section 3, art. 10, subject to no other limitation, provides:

"Whenever the expenses of any fiscal year shall exceed the income, the Legislature may provide for laying tax for the ensuing fiscal year, which with other resources, shall be sufficient to pay the deficiency, as well as the estimated ordinary expenses for the state for the ensuing year."

This section by its terms shows that it was not intended that, because the expenses of a year might exceed the income for that year, such excess should be invalidated. And we may add that we find no purpose in the Constitution to attach any penalty or forfeiture to obligations for current expenses, honestly incurred in the reasonable anticipation that the revenues provided therefor would be sufficient to meet them. It is be-

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lieved that these limitations were intended to prevent the contracting of that class of pecuniary obligations not to be satisfied out of the current yearly funds, or other funds in hand lawfully applicable thereto; and which would, therefore, at the date of the contract, be an unprovided for liability and properly included in the general meaning of the word "debt."

There is no contention here that the debts which were incurred, and are evidenced by the warrants sought to be funded, exceeded, at the time the debts were incurred, the revenue provided in good faith for that year. We therefore have the right to assume that such is not the case, and that, if the revenue provided had been collected and properly applied, they would have been paid. *Tyler v. Jester,* 97 Tex. 344, 78 S. W. 1058. If it has been made clear, as we believe it has, that the debts represented by the warrants were legal at the time when made, and that, therefore, the warrants sought to be funded are legal warrants, it ought to be then conceded as fundamental that no subsequent act or misappropriation, or failure of the funds in good faith provided for, can operate to render them invalid. We cite, however, a few authorities in point. In Judge Dillon's work on Municipal Corporations (5th Ed.) sec. 195, it is said:

"Although the constitutional limit has been reached, warrants may be issued for the ordinary current expenses of the fiscal year to the full amount levied for that year, without incurring indebtedness beyond the constitutional limit. So long as the amounts of such warrants do not in the aggregate exceed the current revenues, no additional indebtedness has been incurred thereby, and usually warrants thus drawn are payable in the order of presentment for registration. Being legal warrants when issued, no subsequent act or misappropriation of funds by the municipal authorities can operate to render them invalid."

And in *Addyston Pipe & Steel Co. v. City of Corry,* 197 Pa. 49, 46 Atl. 1036, 80 Am. St. Rep. 812, we find the following:

"It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure

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to produce the full result. Thus if a city at the time of making a contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, nor to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance."

See, also, *Cedar Rapids v. Bechtel,* 110 Iowa, 196, 81 N. W. 468; *Shannon v. Huron,* 9 S. D. 356, 69 N. W. 598; *In re State Warrants,* 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 852; *Western Town Lot Co. v. Lane,* 7 S. D. 1, 62 N. W. 982.

If the state, in fact, then owes the sums represented by these warrants, it is within the power of the Legislature to provide for their payment in any manner it may choose, so long as it does not violate a constitutional provision. These constitutional limitations under discussion, being obviously directed against the contracting of debts, can have no application to the manner in which valid debts may be evidenced. That the issuing of funding bonds in lieu of a valid pre-existing indebtedness neither creates a debt nor increases the indebtedness of the municipality issuing them has been held in *Re Menefee,* 22 Okla. 365, 97 Pac. 1014, and in *State ex rel. Bd. of Education of Oklahoma City v. West,* 29 Okla. 503, 118 Pac. 146, and is so held by the weight of authority in other states. *Independent School Dist. v. Rew,* 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; *Los Angeles v. Teed,* 112 Cal. 319, 44 Pac. 580; *Lake County v. Standley,* 24 Colo. 1, 49 Pac. 23; *Powell v. Madison,* 107 Ind. 106, 8 N. E. 31; *Marion County v. Harvey County,* 26 Kan. 181; *Gaulbert v. Louisville* (Ky.) 97 S. W. 342; *Opinion of the Justices,* 81 Me. 602, 18 Atl. 291; *Hotchkiss v. Marion,* 12 Mont. 218, 29 Pac. 821; *Poughkeepsie v. Quintard,* 136 N. Y. 275, 32 N. E. 764; *Blanton v. McDowell County,* 101 N. C. 532, 8 S. E. 162; *Morris v. Taylor,* 31 Ore. 62, 49 Pac. 660; *McCreight v. Camden,* 49 S. C. 78, 26 S. E. 984; *Lawrence County v. Meade County,* 10 S. D. 175, 72 N. W. 405; *Miller v. School Dist.,*

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5 Wyo. 217, 39 Pac. 879; *Maish et al. v. Ter. of Arizona,* 164 U. S. 599, 17 Sup. Ct. 193, 41 L. Ed. 567; *Jasper County v. Ballou,* 103 U. S. 745, 26 L. Ed. 422. Under the rule that a refunding transaction does not create debt, the question of having to resort to section 25, art. 10, Williams' Ann. Const. Okla., is eliminated.

This leads us to the question: Has the Legislature provided procedure for the refunding of state indebtedness such as is herein involved? Sections 372 to 381, inclusive, Comp. Laws 1909, furnish such procedure if in force. The funding act was passed in 1895 (Laws 1895, p. 63), and was amended in 1897-1899. The amendment of 1897 (Laws 1897, p. 75) is section 372. The amendment of 1899 (Laws 1899, p. 100) is article 3 of chapter 8, being section 394, Comp. Laws 1909. In 1905 (Laws 1905, p. 87) an act entitled "An act to enable counties, municipal corporations, the boards of education of any city or school districts to refund their indebtedness," was passed by the Legislature, the same being article 7, c. 8, Comp. Laws 1909, and consisting of sections 408 to 421, inclusive.

The contention is made that this act of 1905 repeals the former acts, thereby leaving no statutory provisions affording authority for refunding the warrant indebtedness of the state. We cannot agree to this construction.

It is a familiar rule that repeals by implication are not favored, and, where two statutes covering in whole or in part the same matter are not absolutely irreconcilable, effect should be given, if possible, to both. *Carpenter v. Russell's Adm'r,* 13 Okla. 277, 73 Pac. 930. In Sutherland on Stat. Const. 138, we find:

"Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. The intention to repeal, however, will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance. Implied repeals are not favored. One statute is not repugnant to another, unless they relate to the same subject, and are enacted for the same purpose. When there is a difference in the whole purview of two statutes

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apparently relating to the same subject, the former is not repealed. Such is the general doctrine, in which all the cases concur."

Endlich on Stat. Const. sec. 741, says:

"But, in order to constitute a repeal of a statute by implication, such later act must not only refer to the same subject, and also have the same object in view as the earlier, but it must cover the whole subject-matter of the same."

While the act of 1905 expressly repealed all "acts and parts of acts in conflict herewith," and while it covered fully the matter of refunding the warrants of municipal corporations, school districts, etc., as named therein, the matter of state warrants is nowhere mentioned. Therefore it could hardly be said that the provisions for funding state warrants collide with the provisions of an act that has no reference to state warrants, and, in fact, does not deal with the subject in any way. This being so, the presumption must be indulged that there was no intention to make any change in the law relating to state warrants. *State v. Oldfield,* 22 Okla. 863, 98 Pac. 925. This court has held in *State ex rel. Bd. of Ed. v. West, Atty. Gen.,* 29 Okla. 503, 118 Pac. 146, that the act of 1905 (article 7, c. 8, Comp. Laws 1909) was not repugnant to section 26, art. 10, Williams' Ann. Const. Okla., and was therefore extended over and put in force in the state by section 2 of the Schedule. There can be no reason why the same rule should not apply to article 1, c. 8, Comp. Laws 1909, which provides for funding state warrants, and notwithstanding the fact that section 3, art. 10, of the Constitution provides a method of extinguishing this indebtedness by the levy of a tax for the ensuing year.

The provision made in section 3, art. 10, of the Constitution as vitalized by section 7621, Comp. Laws 1909, while a remedy, is not exclusive. We have held that, the indebtedness represented by these warrants being valid at their inception, no subsequent act or failure of the revenues can operate so as to invalidate them. To hold that section 3, art. 10, and section 7621, Comp. Laws 1909, provide an exclusive remedy, would in practical effect have that result. It would leave the state with a large valid debt outstanding, and with no practical means of ex-

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tinguishing it. This would be no less than repudiation, and we have discovered no disposition upon the part of the people of Oklahoma to repudiate their just obligations. We believe the remedies to be concurrent, and that it is within the sound discretion of the chief officers of the state to select the one they will pursue, as best calculated to subserve the best interests of the taxpaying public. That they have chosen wisely seems obvious.

It would be a great hardship for the people to be compelled to pay this entire indebtedness in one year, in addition to the necessary expenses of government, by immediate taxation. It would seem to be much wiser if this indebtedness is met by the issuance of long time, low interest bearing bonds as is proposed. In the meantime our financial policy and revenue laws will have become settled, and the taxation of much of the Indian lands, now nontaxable, which fact contributed towards this deficiency, will have become liable to bear their share of the burdens of government.

The next point made is that the State Treasurer has applied the revenues collected for one fiscal year to the payment of indebtedness of another fiscal year, and that certain funds in the hands of the Treasurer ought to be applied to the payment of some of the warrants involved in this proceeding. It is clearly contemplated by the Constitution that the funds provided and collected for a particular fiscal year should be applied to the payment of the current indebtedness of such year. The condition here was brought about through the Treasurer following an old precedent in force in that office for several years prior to his incumbency whereby warrants were paid in the order of their registration; but the record shows that the Treasurer is now keeping his accounts in such a way as to meet the views herein expressed.

We have already shown that warrants valid in their inception cannot be rendered invalid by any subsequent act or omission of the officers of the state; hence it follows that the mere fact that revenues accruing in one year have been improperly applied to the extinguishment of the indebtedness of another year cannot have that effect. Any funds in the hands of the Treasurer

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collected for the purpose of defraying the ordinary expense of any fiscal year, ought to be applied to that purpose without delay, thus reducing the warrant indebtedness to that extent, and stopping the running of interest thereon. Besides, this is due the holders of such warrants.

We think the time and manner of the payment of bonds to be issued for the purpose designated herein are controlled by section 377, Comp. Laws 1909, and that section 4, art. 10, Const., which requires the Legislature to provide for the payment of the state debt within 25 years, has reference to a debt created by the passage of a law, inasmuch as it provides that provisions must be made "to pay the annual interest and principal of such debt within twenty-five years from the final passage of the law creating such debt." It has been shown that the issuance of bonds to take up outstanding legal indebtedness is not the creation of a debt. This section of the Constitution has reference to debts created under sections 23-25, art. 10, of the Constitution.

The judgment of the trial court is accordingly reversed, and the cause remanded to be proceeded with in accordance with the views herein expressed.

TURNER, C. J., and HAYES, WILLIAMS and KANE, JJ., being disqualified, the Governor appointed Messrs. J. D. CARMICHAEL, MALCOLM E. ROSSER, J. B. HARRISON, and P. D. BREWER to sit in their places in the consideration and decision of this case.

DUNN, J., and ROSSER, Special Justice, concur. CARMICHAEL and HARRISON, Special Justices, dissent.

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PARKINSON v. SKELTON.

No. 1120. Opinion Filed November 16, 1912.
(128 Pac. 131.)

1. **INDIANS—Lands—Conveyance—"Allottees."** The word "allottees," as used in Act April 21, 1904, c. 1402, 33 St. at L. 204, refers to the parties to whom an allotment is made, and not to their heirs; and where the allottee under the said act would have been authorized to alienate his land, had he lived, the same, on his death, was alienable by his heirs, without reference to their blood.

2. **SAME—Homestead.** B., a white man, duly enrolled as a member of the Creek Tribe of Indians, received his allotment, for which a certificate was duly issued, and died intestate, and without issue, in the fore part of the year 1900. Thereafter patent conveying the said allotment, homestead and surplus, was duly issued to his heirs. **Held**, that the homestead quality did not attach, and if any restrictions existed on alienation of any of said land they were removed by Act Cong. April 21, 1904, c. 1402, 33 St. at L. 204; and the heirs were thereafter authorized to sell and convey the same.

(Syllabus by the Court.)

Error from District Court, Okmulgee County; John Caruthers, Judge.

Action by L. S. Skelton against James Parkinson. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

W. W. Wood, for plaintiff in error.

Stanford & Cochran and *J. C. Stone,* for defendant in error.

DUNN, J. This case presents error from the district court of Okmulgee county. September 16, 1908, L. S. Skelton, defendant in error, as plaintiff, filed in the office of the clerk of the district court of that county his petition against James Parkinson, as defendant, plaintiff in error here, and one Greely McIntosh. No service was had upon the latter, and the action as to him has been abandoned. The purpose of the suit was to quiet title in certain lands described in the petition, situated in Okmulgee county, the title and possession of which plaintiff claimed. To the petition defendant filed answer, setting out in detail the different conveyances by and through which both par-

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ties claim title, and asked for judgment in his favor. To this answer the plaintiff filed a demurrer, which was by the court sustained, and the defendant, relying upon the defenses in his answer, has lodged the cause in this court for review.

The averments of the answer challenged by the demurrer present substantially the following state of facts: One C. C. Belcher, a white man, adopted and enrolled as a citizen of the Creek Tribe of Indians, died some time in the early part of the year 1900, without issue, and intestate. Prior to his death, the lands described in the petition and answer had been selected by him as his allotment, and there had been issued to him a certificate therefor. He left surviving him as his sole heirs certain mixed and full blood Indians, enrolled members of the tribe, to whom, as heirs, patents, homestead and surplus were subsequently issued for decedent's land. In reference to the sale and transfer of this property by these heirs, out of which this controversy arises, it is sufficient to say that deeds were duly executed and delivered by them to the defendant, Parkinson, in March, 1905; the land being purchased and conveyed under the theory that the act of April 21, 1904 (33 St. at L. 204), had removed the restrictions upon its alienation, and hence that title could be conveyed. The answer recites with particularity the sale and conveyance of the same land, made by the same parties, to the plaintiff, Skelton, which he took by a series of conveyances, the first of which was executed in May, 1906, and the balance during the years of 1907 and 1908. This purchase and sale of the land was made under the theory that there existed restrictions on its alienation, and that the act above referred to did not release the restrictions, and that the title, notwithstanding the conveyance to defendant, Parkinson, still remained in these heirs, which land, by reason of the expiration of the five-year period contained in section 7 of the act of March 1, 1901 (31 St. at L. 863, c. 676), known as the original agreement, and the same provision contained in the act of June 30, 1902, known as the supplemental agreement (32 St. at L. 500, c. 1323) had become subject to sale and transfer, and that the heirs were qualified to convey it.

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It will thus be seen that all parties assume that the land was restricted; and hence the construction of the act of April 21, 1904 (33 St. at L. 204), and the determination of the question of from whom, and to what extent, it removed restrictions, is presented.

The second proposition grows out of the homestead allotment, the claim being made that the 40 acres denominated a homestead should not be regarded as being within the purview of section 7 of the act of March 1, 1901 (31 St. at L. 863), for the reason that none of the land had the character of homestead land and it occupied the same status as the surplus allotment, and that the act of April 21, 1904 (33 St. at L. 204), removed any existing restrictions from the entire allotment.

The propositions here presented will be treated in their order, and are discussed and decided on the theories presented by counsel in their briefs.

As above noted, there is involved herein lands denominated both surplus and homestead. We will first deal with the so-called surplus land, leaving the question of the homestead for a subsequent paragraph.

That portion of section 7 of the act of March 1, 1901 (31 St. at L. 863), being the first Creek agreement, which relates specifically to the question now before us, reads as follows:

"Lands allotted to citizens hereunder shall not * * * be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

Section 16 of the Act of Congress of June 30, 1902 (32 St. at L. 503), known as the supplemental agreement, stripped to present those portions pertinent to this inquiry, reads as follows:

"Lands allotted to citizens shall not * * * be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior."

Assuming that the foregoing acts placed restrictions on this land in the hands of the heirs, it is evident that if they were in force at the time of the making of the deeds in question in 1905

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the heirs would have lacked the power to alienate; for it is not claimed that the Secretary of the Interior gave his approval to any of these deeds. The restrictions therein imposed, however, it is contended, were removed, and these heirs rendered qualified to alienate at least the surplus land. That portion of the act of April 21, 1904 (33 St. at L. 204), relied upon and pertinent and necessary for our consideration is found in the miscellaneous section, and reads as follows:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed. * * *"

Considering the proposition under discussion: From what and whom were restrictions on alienation removed? Clearly from lands, not homestead (where it existed), of allottees who were not minors or of Indian blood. Who was an allottee? Mr. Bledsoe, in his work on Indian Land Laws, at section 37, says:

"The word 'allottee' has been uniformly construed to mean a person who has selected and has set apart to him the land he desires to take in allotment."

And defining the word as the same is used in this particular treaty, at section 52, *Id.*, he says:

"It is the restriction upon the alienation of lands of *allottees* that is removed. The word 'allot' means to set apart a thing to a person as his share. Anderson, Law Dictionary, p. 51; 2 Cyc. 134."

He further says in the same section:

"It cannot well be urged that a member of the tribe becomes an allottee until he selects his allotment. Prior to that time he is not an allottee; subsequent to that time he is, as to the land set apart to him, an allottee."

If the foregoing definitions of the word "allottee" are correct, and we believe them to be, then Belcher, the decedent, not of Indian blood, was the allottee in this case, and not his heirs.

The recent case of *U. S. v. Jacobs,* 195 Fed. 707, by the Circuit Court of Appeals of the Eighth Circuit, dealt with this act, and held that the adult heirs of a deceased minor Creek freedman could alienate. It is to be observed, however, that in

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that case the heirs were the allottees, and not the deceased minor. The minor, Pearlie Jacobs, was held to have been living on the 1st day of April, 1899, and entitled to an allotment, but had not selected it; nor had it been selected for her. Hence the same was not confirmed, as provided for in section 6 of the act of March 1, 1901 (31 St. at L. 863), but was taken under and by virtue of the terms of the second paragraph of section 28 of the same act; and the land to which she would have been entitled, had she lived, descended to her heirs, and was directly allotted and distributed to them. Hence they were the allottees. This was not true in the case at bar. Belcher, the deceased white man, was the allottee, because he was the one to whom the allotment was made. On the question of whether the act released the restriction as to heirs, Judge Munger, who prepared the opinion in that case, said:

"It is insisted upon the part of the government that the defendants could not be *bona fide* purchasers, because, under the law, the heirs of Pearlie Jacobs were prohibited from alienating the land for a period of five years. They argue that by section 16, above quoted, the prohibition upon alienation before the expiration of five years was a prohibition against alienation by the allottee or his heirs, and as the term 'heirs' was not used in the act of April 21, 1904, removing the restrictions, that the restriction was only removed so as to authorize the allottee to make a conveyance. We do not so construe the statute. The act of April 21, 1904, above quoted, says: 'And all restrictions upon the alienation of lands of allottees, except minors, are removed.' This was not a removal of the restriction upon alienation by the allottee only, but was general and applied to allottees or heirs of allottees, except in cases only of minors; and no claim is made that any of the heirs of Pearlie Jacobs were minors. Hence it is clear that there was no restriction upon the alienation by them."

This case is not exactly in point in the case at bar, however; for the only question was: Could the adult allottee heirs not of Indian blood alienate? On this we think there can be no doubt; and, while we confess there may be room for argument, we feel confident that when the law lifted the restrictions, if any existed, from the land in this case, it did not intend to continue the disability of exercising the right of alienation on those

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into whose hands it fell. The heirs took it with just such rights and privileges as the ancestor held.

The yardstick used by Congress to measure the capacity of these people to enjoy the right to alienate their lands was and has been blood and age. Those of Indian blood and minors have received its especial care. It was doubtless not considered likely that full and half blood heirs would inherit from a white man as an allottee, or else it was deemed to be too infrequent to require notice; hence no provision was made for it. So it happens that these Indian heirs are authorized to sell the land they have inherited from their white ancestor.

Under this construction, also, it doubtless sometimes happened that freedmen and white people fell heir to lands of which Indians of the blood had been the allottees, and the incongruous situation was presented of their being, under the act of 1904, fully endowed with authority to sell their own allotments, yet could not sell the land they inherited. There could be no reason to support such a situation.

Judge Amidon, in the case of *Shultis v. McDougal et al.* (C. C.) 162 Fed. 331, states that it was never the intent of either the tribe or of the government to grant to parties having a kinsman who had died additional lands as a bounty. There could be no object or purpose in that. See, also, *Hancock et al. v. Mutual Trust Co. et al.*, 24 Okla. 391, 103 Pac. 566, and the case of *Mullen et al. v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, decided by the Supreme Court of the United States, April 15, 1912.

So two years later Congress passed the act of April 22, 1906 (34 St. at L. 145, c. 1876), section 22 of which reads:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may

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reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The terms of this act confirm us in the conclusion to which we have arrived in holding that the heirs of allottees not of Indian blood could alienate. Congress virtually says that "by the act of 1904 we permitted the adult heirs of all allottees *not* of Indian blood to alienate, and now by this act of 1906 we permit the adult heirs of those allottees who *are* of Indian blood to alienate." For us to hold otherwise would be to ignore every rule and policy adopted and acted on by Congress since it began to deal with these tribes and their lands. To hold otherwise would be to say that Congress had provided that the heirs of deceased Indian allottees could alienate their lands, but the heirs of deceased white and freedmen members of these tribes could not. Such a conclusion, in our judgment, is not tolerable; hence, for the reasons stated, we reject it.

The remaining question relates to the so-called homestead. The decedent, to whom a certificate of allotment was issued, died without having selected a homestead from his allotment; but a patent was issued, in which a certain portion was so denominated. Section 7 of the original Creek agreement of March 1, 1901 (31 St. at L. 863), reads as follows:

"Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: Provided, that selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said commission to make selection for him.

"The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall

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descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

As Belcher died prior to the passage of this law, he could not, and did not, act under it in making any selection of a homestead, and the question arises: Of what force and effect was the selection or denomination of a portion of his allotment as such?

The first paragraph above quoted clearly indicates for whom homesteads were to be selected. Every one therein referred to was a living citizen or allottee—none other. There could be no object in selecting a homestead for a dead man. Nor could there be any object in selecting a homestead for his heirs. If they were allottees, they had homesteads of their own; if they were not, the law was not intended for them or their protection. See the discussion of this proposition in *Hancock et al. v. Mutual Trust Co. et al., supra,* and *Mullen et al. v. U. S., supra.* So we have neither a law nor a reason for a law to support the claim that the allottee, who died prior to the date of this act, had a homestead; and, although a portion of the land may have been so designated, it was without force or effect. The section quoted provides for the selection by the citizen, or, where, for any reason, he could not do so, by the Commission. The homestead portion, it was then provided, should remain, after the death of the allottee, for the use and support of the children born to him after the ratification of the agreement; but if he had no issue he might then dispose of it by a will, free from the homestead limitation, and, dying intestate, the land descended to his heirs, free from such (the 21-year) limitation; the heirs thereby taking the land with the same restrictions upon it as existed upon the surplus. The decedent in the case at bar died before the ratification of this treaty, without issue born thereafter, and the conditions upon which the homestead right became vested never arose, either as to him or his heirs.

A very satisfactory discussion of this question is contained in the case of *Hawkins et al. v. Oklahoma Oil Co. et al.,* 195 Fed. 345, from the Circuit Court of the United States for the Eastern District of Oklahoma, by Judge Campbell. The land

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involved in that case was both homestead and surplus. The deceased and heirs were all Creek freedmen; and, while the land was allotted directly to the heirs in 1901 in two separate tracts, one as homestead and the other as surplus, and patents in 1904 issued therefor, the reasoning applicable to such a situation is entirely pertinent to the facts in the case at bar. In the opinion it is said:

"In such case, of course, the one allotment of 160 acres vests jointly, in its undivided entirety, in as many different persons as there are heirs to take. No provision is made in such case for their joint selection out of the tract of a 40-acre homestead; and the lack of reason for and the very absurdity of such a provision is manifest from the very statement of the proposition. The practice of the Commission, therefore, in dividing the allotment in such instances into separate tracts, designating one the homestead and the other the surplus, is, in my judgment, without reason or authority; and the fact that it did so does not change the essential status of the land, which must be considered the same as the surplus portion or individual allotments made to living members. The act of April 21, 1904, therefore, removed the restrictions from the land involved in this case."

The so-called homestead, therefore, being received by the heirs with the same limitations upon alienation as existed with reference to the surplus, they were authorized, under and by virtue of the terms of the act of April 21, 1904, to alienate the same; and it therefore follows that the judgment of the trial court must be reversed, which is accordingly done, and the case remanded with instructions to proceed in accordance with this opinion.

The view that there never were any restrictions upon this land has been considered; but as it was not argued by either counsel, and as the result reached would be the same, the theory of the parties has been adhered to and the opinion written from their viewpoint.

TURNER, C. J., concurs. HAYES, J., concurs in the conclusion. WILLIAMS and KANE, JJ., absent, and not participating.

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42. **Same.** Where, on the trial of a cause to a court without a jury, the evidence reasonably sustains the decision rendered, the Supreme Court will not reverse it. **Lynde-Bowman-Darby Co. v. Huff** 239

43. **Same.** Where a case is tried and special findings of fact are made, and those findings are based upon oral testimony, such findings are conclusive upon the Supreme Court upon any disputed and doubtful questions of fact. **Scoville v. Powell** 446

44. **Same.** Where an officer charged with selecting three newspapers of general circulation for an official publication has acted, and the finding of the trial court supports such action and the evidence sustains the finding, it will not be disturbed. **Stine v. Lewis** 609

45. **Discretion of Trial Court—Amendment of Pleading.** Leave to amend pleadings at any stage of the proceeding is largely in the sound discretion of the trial court, and rulings on such questions will not be disturbed on appeal, unless it appears that the court abused its discretion. **Drennan v. Warburton** 561

46. **Same—Grant of New Trial.** The granting of a new trial being so much within the discretion of the trial court, the Supreme Court will not reverse an order of such court granting a new trial unless error is clearly established in respect to some pure, simple, and unmixed question of law. **Ardmore Lodge No. 9, I. O. O. F., v. Dawson** 37
Jamieson v. Classen Co. 77
Stapleton v. O'Hara 79
Diamond v. Shaw 333

47. **Harmless Error.** The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. **Bank of Fairview v. Martin** 319

48. **Same.** Errors committed by a court on a trial, which cause no prejudice, will not require a reversal of the judgment rendered on appeal. **St. Louis, I. M. & S. Ry. Co. v. Marlin** 510

49. **Same—Instructions.** Where it is apparent that an instruction given could not prejudice the rights of the losing party upon the theory his case was tried below, the same will not be held to be reversible error, although the instruction given may not have been technically correct. **West & Russell v. Rawden** 399

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APPEAL AND ERROR—Continued.

50. **Same—Pleading.** Where a petition on a note by the indorsee stated a cause of action and the cause was tried on a bad plea in confession and avoidance and an immaterial issue found for plaintiff, the cause would not be reversed for repleader, but judgment would be affirmed. **Bierce v. State Nat. Bank of Memphis, Tenn.** ---- 776

51. **Burden of Showing Error.** In the Supreme Court error must be affirmatively shown; and where this is not done the judgment of the court below will be affirmed. **Snider v. Perkins**---- 338

52. **Insufficiency of Record.** Where plaintiff failed to file a motion for new trial, and no error is apparent on the face of the record, there is nothing for review. **Hunter v. Hines**---- 590

53. **Pleading—Amendment to Conform to Evidence.** In a suit for partial loss on a hail policy, where plaintiff pleads performance of all conditions precedent and defendant specifically denies the same, as provided by Comp. Laws 1909, sec. 5662, and on trial plaintiff makes ineffectual effort to prove a waiver, but defendant introduces facts sufficient to constitute a waiver, plaintiff's petition will be regarded as amended to conform to the facts. **St. Paul Fire & Marine Ins. Co. v. Griffin**---- 178

DISPOSITION OF CAUSE:

54. **Remand—Procedure—Second Appeal.** Where a cause is reversed and remanded by the Supreme Court with directions to proceed in accordance with the decision of the appellate court, and the court below proceeds in substantial conformity with such direction, its action will not be considered on a second appeal. **Harsha v. Richardson** ---- 108

55. **Death of Party on Appeal—Effect.** Where, after an appeal is perfected, one of the parties dies before submission of the cause, a judgment rendered without revivor and without the court's attention being called to the death of the party is not absolutely void, but voidable. **Town of Jefferson v. Hicks**---- 407

56. **Same.** Under Comp. Laws 1909, secs. 6094, 6101, made by section 6102 to apply to the Supreme Court, that court is authorized, on proceeding within three years after judgment, to set aside a judgment for death of one of the parties before judgment. **Idem** 407

57. **Same.** Comp. Laws 1909, secs. 6094, 6101, do not make it mandatory on the Supreme Court to vacate a judgment rendered after death of one of the parties, and, where a motion to vacate a judgment of affirmance is filed one and one-half years after it is rendered, it will not be sustained, where it does not appear that the petition states a cause for reversal, or that plaintiff in error was in any way prejudiced. **Idem**---- 407

APPEARANCE—See "Appeal and Error," 22, 23, 25.

1. **Redelivery Bond—Effect.** Where property has been taken under replevin, and defendant executes a redelivery bond, conditioned to return the property and pay costs and damages that may be awarded, and the sheriff returns the property to the defendant,

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APPEARANCE—Continued.

the giving of such bond is an appearance in the action and a waiver of any defect in the summons. **Ferguson v. McKee**..... 332

2. **Special Appearance.** An appearance, in order to be special, must be shown to be such by a proper designation and entitlement. **Drennan v. Warburton**..... 561

ASSIGNMENT—See "Frauds, Statute of"; "Guaranty"; "Landlord and Tenant."

ASSIGNMENTS OF ERROR—See "Appeal and Error."

ATTORNEY GENERAL—See "Municipal Corporations," 8.

ATTORNEYS—See "**Prosecuting Attorneys.**"

AUTOMOBILES—See "Parent and Child."

B.

BANKRUPTCY:

Fraudulent Preferences—Knowledge of Creditor. Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop; and where the effect of a conveyance by an insolvent to a creditor, within four months prior to his bankruptcy, was to give such creditor a preference over other creditors, it will be conclusively presumed that it was so intended; and the conveyance is voidable if it is shown that the creditor knew or had reasonable cause to believe such fact. **Hume v. Brown Shoe Co.**..... 634

BANKS AND BANKING—See "Bills and Notes"; "Landlord and Tenant"; "Trusts."

1. **Trust Funds—Application to Debt to the Bank.** Where a depositor having a trust account with a bank drew a check thereon to pay a private debt to the banker, who, with knowledge of the trust, applied the amount on an individual claim of the bank, the bank acquired no title to the fund as against the true owner. **Fidelity & Deposit Co. of Maryland v. Rankin**..... 7

2. **Collections—Negligence—Liability.** Where the payee of a check drawn on a bank presents the same to another bank for collection, which bank gives him credit therefor on his passbook, the relation of principal and agent arises, and it is the duty of the agent to exercise reasonable care and diligence to make the collection; and its failure to do so renders it liable for any loss its principal may suffer thereby. **Bank of Commerce v. Ingram**..... 46

3. **Forged Check—Payment—Rights of Bona Fide Holders.** A drawee, who pays to a bona fide holder a check to which the drawer's name has been forged, cannot recover the amount of such payment. **Cherokee Nat. Bank v. Union Trust Co.**..... 342

4. **Same.** Where a bank, in good faith and for value, purchases from an indorser a check upon another bank, and it is paid by the drawee bank, the drawee bank, upon discovering it to be a forgery, cannot, under Comp. Laws 1909, secs. 4496, 4622, recover back the money paid. **Idem**..... 342

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BANKS AND BANKING—Continued.

5. **Deposits—Guaranty Fund—Permanent School Fund.** Comp. Laws 1909, sec. 7943, provides a specific system for the protection of any part of the permanent school fund temporarily deposited in banks or trust companies, and the protection extended to general depositors by section 323, providing for the depositors' guaranty fund, does not apply to deposits of the permanent school fund. **Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.** ---------- 535

BILL OF EXCEPTIONS—See "Appeal and Error," 17, 18, 40.

BILLS AND NOTES—See "Appeal and Error," 50; "Banks and Banking"; "Corporations"; "Guaranty"; "Indians," 11; "Mortgages"; "Pledges."

1. **Indorsement—Sufficiency.** An indorsement on the back of a nonnegotiable promissory note, which reads: "For value received I hereby guarantee the payment of the within note at maturity, or at any time thereafter, with interest at the rate of ——— per cent. per annum until paid. Waiving demand, notice of nonpayment and protest, as collateral"—signed by the payee, is sufficient to pass the title to the paper. **McNary v. Farmers' Nat. Bank** 1

2. **Negotiability—What Law Governs.** Where a mortgage on land in Oklahoma, given to secure a note payable in Kansas, provided that both should be governed according to the laws of Oklahoma Territory, the question of the negotiability of the note will be determined as if both had been executed and payable in Oklahoma. **Goss v. Sorrell** ---------- 586

3. **Same—Note Due on Default.** A provision in a note that, on failure to pay interest coupons attached, the principal and all interest shall become due and payable at once, renders the note nonnegotiable. **Idem** ---------- 586

4. **Action on Note—Issues—Denial of Validity.** In a suit on two notes commenced by the indorsee in the then Indian Territory, where defendant pleaded the general issue, but failed to file affidavits denying genuineness under Mansf. Dig. sec. 2872 (Ind. T. Ann. St. 1899, sec. 1987), an offer to prove that the president of the defendant bank had no authority to sign the note was inadmissible. **Citizens' Nat. Bank v. Warner & Jackson** ---------- 692

5. **Same.** Where, in an action on a note, it is not alleged that it is invalid, a mere denial that it was indorsed for value does not raise an issue. **Idem** ---------- 692

6. **Acceptance—"Payment" by Indorser.** On the maturity of a note indorsed to a bank, the maker wired the bank to have the indorser take up the note and draw on the maker. The bank accepted a check on itself from the indorser, and noted the date opposite the entry of the note as the date when paid, and forwarded the draft for collection. **Held,** that there was a payment of the note by the indorser. **Bierce v. State Nat. Bank of Memphis, Tenn.** ---------- 776

7. **Same—Suit on Note—Parties.** Where a note indorsed to a bank at the maker's request was paid by the indorser, and a draft on the maker was returned unpaid, the bank, being the legal owner of the note, was the real party in interest and entitled to sue thereon. **Idem** ---------- 776

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BOARD OF AGRICULTURE—See "Animals."

BONDS—See "Appeal and Error," 4; "Appearance"; "Counties," 6, 7; "Highways"; "Municipal Corporations," 8; "Sheriffs and Constables"; "States."

BOUNDARIES—See "Municipal Corporations," 9.

BREACH OF MARRIAGE PROMISE:

1. **Exemplary Damages.** The law in reference to the damages recoverable in an action for breach of promise of marriage is analogous to that in actions for torts, and exemplary damages may be awarded upon like grounds. **Baumle v. Verde** 243

2. **Evidence.** In an action for breach of marriage promise, any evidence tending to disclose actual relation of the parties is admissible. **Idem** 243

3. **Instructions—Exemplary Damages.** In action for breach of promise of marriage, an instruction authorizing exemplary damages, aside from actual damages, is error under Comp. Laws 1909, sec. 2887; as exemplary damages are allowable only on evidence of oppression, fraud, or malice. **Idem** 243

BRIBERY—See "Counties," 11, 12.

BRIDGES—See "Counties," 5.

1. **Construction by Counties—Co-operation of Towns and Townships.** Under Sess. Laws 1903, c. 29, art. 2, sec. 6, as amended by Sess. Laws 1905, c. 32, art. 1, sec. 3, the county commissioners are authorized to contract for the construction of a bridge more than 200 feet in length across a stream between two townships only when each township has offered to pay one-half of one-fourth of the cost, and not where the townships and an incorporated town within one of them have each agreed to pay one-third of one-fourth of the cost. **Harlow v. Board of Com'rs of Payne County** 353

2. **Same—Distance Between Bridges.** In measuring the distance between the proposed location of a bridge and the nearest bridge on the same stream, to determine whether it is more than six miles, as required by Comp. Laws 1909, sec. 7881, the statute requires the measurement to be upon a straight line. **Idem** 353

BRIEFS—See "Appeal and Error."

BROKERS—See "Trusts."

1. **Sale of Oil Leases—Compensation.** Where owners of a mining lease employed brokers to sell the same within a stipulated time for a price based on the daily gauge of the output, and the owners accepted an offer with knowledge that the gauge had not been made, they waived such provision and the brokers were entitled to their compensation. **Bailey v. Rowe** 51

2. **Authority—Acting for Both Parties.** A sale of real estate from which a substantial advantage has been derived cannot be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser, unless it appears that the principal after full

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BROKERS—Continued.

knowledge of all the facts confirmed the acts of the agent. **Evans v. Brown** 323

3. **Same—Unauthorized Acts—Ratification—Evidence.** Evidence held sufficient to support the finding of the court below as to the scope of the agency, and that there was no confirmation by the principal after full knowledge of all the facts. **Idem**..... 323

4. **Procuring Loan—Agency for Lender or Borrower.** Where the same person was a member of a partnership and president and manager of a corporation, an agreement in an application by a third person to the corporation for a loan that the firm was an agent of the applicant did not render the firm an agent, and payment of the loan to the firm was not a payment to the applicant. **Goss v. Sorrell**..... 586

5. **Same—Payment of Loan to Agent.** An application to a mortgage company for a loan, stating that the firm was the agent for the applicant to procure the loan, either from the company or from any other person upon the same terms, even if creating an agency, did not authorize the agent to procure the money by transferring the note and mortgage. **Idem**..... 586

6. **Real Estate Agents—Right to Commission.** When property has been listed for sale with different real estate agents, the agent who induces the seller and purchaser to enter into the contract is entitled to the commission, although another agent may have first brought the parties together. **Nation v. Harness**..... 630

C.

CARRIERS—See "Appeal and Error," 8; "Master and Servant"; "Railroads"; "Telegraphs and Telephones."

1. **Regulation—Corporation Commission—Freight.** Rule 6 of Order 168 of the Corporation Commission, relating to the time for forwarding freight, applies only to intrastate shipments; and a fine on account of interstate shipments cannot be imposed upon a carrier thereunder. **Atchison, T. & S. F. Ry. Co. v. State**..... 105

Same 158

2. **Carriage of Live Stock—Contract—Limitations.** A shipper of live stock cannot, in the absence of fraud, avoid limitations of liability of carrier in bill of lading or shipping contract by showing that he executed the contract without due care. **St. Louis & S. F. R. Co. v. Ladd**..... 160

St. Louis & S. F. R. Co. v. Sparks..... 509

3. **Same—Notice of Injury.** By the laws in force in the territory of Oklahoma, provision in live stock contract for notice of injury to the shipment before removal, the notice to be served within one day after delivery as a condition precedent to recovery of damages, was valid. **Idem**.....160, 509

4. **Same.** A stipulation fixing time and manner of notice of injury may be waived by the carrier impliedly or expressly. **Idem**...160, 509

5. **Same.** Where, from the nature of the injury inflicted upon cattle in shipment, serious damage must have been apparent on their

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CARRIERS—Continued.

arrival, the question of the reasonableness of the provision for notice of such injury is a question for the court. **Idem**.....160, 509

6. **Same.** Where there is evidence that the freight claim agent of a common carrier received claim for damages to a shipment of live stock after the time limited by the contract, question of whether the carrier intends to waive the notice clause is a question for the jury. **Idem** 160, 509

7. **Express Companies—Uptown Offices—Orders of Corporation Commission—Evidence.** Evidence **held** sufficient to sustain the justness and reasonableness of the order of the Corporation Commission requiring an express company to maintain an uptown office. **U. S. Express Co. v. State**..... 370

8. **Orders of Corporation Commission—Failure to File Tariff Sheets—Presumption.** Where a railway is charged with not having filed a tariff sheet within the time prescribed by the Corporation Commission, and the evidence shows that the tariff sheet has not been filed, the presumption is that the act was willful. **Atchison, T. & S. F. Ry. Co. v. State**..... 371

9. **Same—Evidence.** Evidence **held** to justify the Corporation Commission in finding that the failure of a railway to file a tariff sheet within the time prescribed was willful. **Idem**..... 371

10. **Injuries to Animals—Care Required.** That the owner of a shipment of live stock accompanies the same does not relieve the carrier of its common-law liability, in the absence of a specific agreement that he would care for the animals. **Midland Valley R. Co. v. Pugh**..... 648

11. **Same—Parties to Action.** Evidence that plaintiff is the consignor and consignee, and also the owner of a shipment of cattle, shows that he is the real party in interest, and the proper party to prosecute an action for their injury. **Idem**..... 648

12. **Street Railroads—Regulation—Powers of Cities.** A city ordinance granting a street railway franchise, and reserving the right to enact needful police regulations, **held** not to preserve to the city the right to prescribe rules and regulations for the operation of the road, as those terms are used in Const. art. 9, sec. 18. **Oklahoma Ry. Co. v. Powell**..... 737

13. **Same—Orders of Corporation Commission—Transfers.** An order requiring a street railway company to stop cars passing each other to transfer passengers under specified conditions **held** within the power of the Corporation Commission and to be neither unreasonable nor unjust. **Idem**..... 737

14. **Same.** An order that a street railway company in Oklahoma City give transfers on request, **held** within the power of the Corporation Commission and to be reasonable and just. **Idem** 737

15. **Street Railroads—Corporation Commission Order—Violation—Defenses.** Where the operatives of a street car company violated an order of the Corporation Commission, requiring cars to stop

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CARRIERS—Continued.

at certain stations, it was no defense in a prosecution of the street car company that its manager had instructed the employees to comply with the order. **Oklahoma Ry. Co. v. State** ---------- 752

16. **Street Railroads—Reduced Fares for School Children.** Where a street railroad's franchise ordinance required the issuance of twenty-ride tickets at the rate of 2½ cents each to children under fifteen actually attending the "public schools of the city," such quoted clause included a parochial school maintained by private benevolence. **Oklahoma Ry. Co. v. St. Joseph's Parochial School** 755

CASE-MADE—See "Appeal and Error."

CATTLE—See "Animals."

CHANCERY—See "Equity."

CHARGE TO JURY—See "Instructions."

CHARITIES AND CORRECTIONS—See "Mandamus," 4, 5.

CHARTERS—See "Municipal Corporations," 6, 7; "Quo Warranto."

CHATTEL MORTGAGES—See "Bankruptcy"; "Judgment"; "Replevin."

CHECKS—See "Banks and Banking"; "Bills and Notes," "Guaranty."

CHILDREN—See "Carriers," 16; "Parent and Child."

CITIES—See "Municipal Corporations."

CLERKS OF COURTS—See "Officers."

1. **Custody of Funds—Trust—What Constitutes.** A United States Court clerk receiving moneys by virtue of his office holds the same in trust. **Fidelity & Deposit Co. of Maryland v. Rankin** 8

2. **Compensation—Statutes—Construction—Mistakes.** In view of Sess. Laws 1910, c. 69, section 15a, providing the compensation of the clerk of the county court, the words "clerk of the superior court will be substituted in section 30, again providing compensation of the clerk of the county court, for the words "clerk of the county court." **Schaffer v. Board of Com'rs of Muskogee County** ---------- 288

3. **Qualifications—Sex.** A woman, otherwise qualified, is eligible to hold the office of clerk of the district court. **Gilliland v. Whittle** 708

COLLATERAL ATTACK—See "Guardian and Ward."

COLLATERAL SECURITY—See "Pledges."

COLLECTIONS—See "Banks and Banking"; "Bills and Notes."

COLLEGES AND UNIVERSITIES:

1. **Agricultural and Mechanical College—Powers as to Students—Uniform.** The board of regents of the Agricultural and Mechanical College is authorized to prescribe a uniform and require it to be worn by the students. **Connell v. Gray** ---------- 591

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COLLEGES AND UNIVERSITIES—Continued.

2. **Same—Matriculation Fee.** A reasonable sum may be required to be deposited by each student in the Agricultural and Mechanical College as a condition precedent to entrance, to be held as earnest money for negligent breakage or damage, and to be refunded at the end of the term or session, if not consumed by the breakage or damage done by such student. **Idem**..... 591

3. **Same—Age of Admission.** All males and females, citizens of the state, between the ages of 12 and 30 years are entitled to admission to all the privileges of the Agricultural and Mechanical College, and instruction therein. **Idem**..... 591

4. **Same—Incidental Fee.** The board of regents of the Agricultural and Mechanical College has authority, where not prohibited, to collect an incidental fee to bear expenses necessary to accomplish the object of the institution. **Idem**..... 591

5. **Same.** The board of regents of the Agricultural and Mechanical College may require each student to be provided with a uniform prior to entrance, or to make a reasonable deposit to procure the same. **Idem** 591

COMMERCE—See "Carriers."

COMMERCIAL PAPER—See "Bills and Notes."

COMMISSIONER OF CHARITIES AND CORRECTIONS—See "Mandamus," 4, 5.

COMMISSIONER OF INSURANCE—See "Quo Warranto."

COMMON CARRIERS—See "Carriers."

CONDEMNATION—See "Eminent Domain."

CONSTITUTIONAL LAW—See "Animals"; "Corporations"; "Counties"; "Courts"; "Criminal Law"; "Highways"; "Homestead"; "Municipal Corporations," 6, 7; "Officers"; "Public Lands"; "Quo Warranto"; "Railroads"; "States"; "Statutes"; "Taxation"; "Telegraphs and Telephones."

1. **Contempt—Right to Jury Trial.** Bill of Rights, art. 2, sec. 25, giving any person accused of violating, when not in the presence of the court or judge, any order of injunction a right to a trial by jury, is effective, and, as supplemented by the common law and by Comp. Laws 1909, sec. 5534, and provisions relating to jury trials, supplies a sufficient rule by which the right given may be enforced. **McKee v. De Graffenreid**..... 136

2. **Quarantine Law—Who May Question Constitutionality.** The constitutionality of Comp. Laws 1909, sec. 222, providing for criminal prosecutions for violation of the quarantine law, cannot be raised by a party against whom action is taken merely to compel him to dip his cattle, as provided for therein, or subject him to the cost thereof. **Stine v. Lewis**..... 609

CONTEMPT—See "Constitutional Law"; "Habeas Corpus"; "Mandamus," 3; "Quieting Title."

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CONTRACTS—See "Banks and Banking"; "Bills and Notes"; "Bridges"; "Brokers"; "Carriers"; "Counties," 5, 13; "Covenants"; "Customs and Usages"; "Divorce"; "Evidence"; "Fixtures"; "Frauds, Statute of"; "Guaranty"; "Guardian and Ward"; "Indians," 11; "Insurance"; "Landlord and Tenant"; "Master and Servant"; "Mortgages"; "Municipal Corporations," 1-5; "Pleading"; "Pledges"; "Principal and Surety"; "Property"; "Sales"; "Specific Performance"; "States"; "Trusts"; "Vendor and Purchaser."

CONVEYANCES—See "Brokers"; "Covenants"; "Deeds"; "Divorce"; "Fixtures"; "Indians"; "Quieting Title"; "Specific Performance"; "Vendor and Purchaser"; "Witnesses."

CORPORATION COMMISSION—See "Carriers"; "Railroads"; "Telegraphs and Telephones."

CORPORATIONS—See "Banks and Banking"; "Brokers"; "Carriers"; "Municipal Corporations"; "Quo Warranto"; "Railroads"; "Telegraphs and Telephones."

Actions—Filing List of Stockholders—Necessity of Same. An answer in bar to an action on a note setting up that the plaintiff, a corporation, had not complied with Williams' Ann. Const. art. 9, sec. 43, par. 260, requiring filing of list of stockholders, etc., before doing business, **held** subject to demurrer. **Joiner v. Ardmore Loan & Trust Co.** ---------- 266

COUNTIES—See "Bridges"; "Mandamus," 4, 5; "Schools and School Districts."

1. **Indebtedness—Limitations.** The limitation imposed upon county indebtedness by section 1 of chapter 16, Sess. Laws 1895, Ter. of Oklahoma (section 1683, Comp. Laws 1909), includes debts and liabilities incurred and fixed by operation of law as well as those arising from express contracts. **Kerr, County Clerk, v. State ex rel.** 110

2. **Same.** Section 26 of article 10, p. 150, Williams' Ann. Const. Okla., fixes a limitation upon the authority of the Legislature and other agencies of the state to allow the counties, cities, and other subdivisions of the state to become indebted and is not a limitation upon the authority of the Legislature to fix a limit within the bounds therein determined, hence section 1 of chapter 16, Sess. Laws 1895 (section 1683, Comp. Laws 1909), is not repugnant thereto and was brought over and became a valid statute of this state under and by virtue of the terms of the Enabling Act and Schedule to the Constitution. **Idem**---------- 110

3. **Officers — County Attorney — County Clerk — Salaries.** At the time of the adoption of the Constitution, the salary of the county attorney elected at that time, being fixed at $2,000 per annum by section 18 of the Schedule, because of article 23, section 10, of the Constitution, cannot be changed during his term of office, and was not reduced by a decrease in the population of the county, ascertained according to a census taken pursuant to the act of April 8, 1908 (Laws 1907-08, c. 9, art. 1). Nor was the salary of the county clerk, elected at the same time, nor the $600 allowed him for clerk hire thereby reduced, being fixed by act of March 10, 1905 (Laws 1905, c. 19, art. 1), extended to and put in force throughout the state. But the latter, being no part of

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COUNTIES—Continued.

his salary, could be and was raised by the act of May 29, 1908 (Laws 1907-08, c. 25, art. 1), allowing the clerk for clerk hire $800. **Board of Com'rs of Greer Co. v. Henry** 210

4. **Indebtedness—Allowance of Claims.** Under Sess. Laws 1910-11, c. 80, sec. 9, the county commissioners cannot allow and approve a claim against any fund where, during the fiscal year, claims have been allowed and approved on the fund equal to the estimate made and approved by the excise board, though there be an unexpended balance to the credit of the fund. **Shannon v. State** 293

5. **Bridge Contracts—Injunction by Taxpayer.** A resident taxpayer may enjoin the carrying out by county commissioners of a void contract for the construction of a bridge, though the taxpayers have the right of appeal to the district court from the order of the commissioners for such construction. **Harlow v. Board of Com'rs of Payne County** 353

6. **Bonds—Issuance—Remonstrance.** Section 409, Comp. Laws 1909, contemplates that remonstrances against the issuance of refunding bonds by a county, where the debt to be refunded exceeds the sum of $1,000, shall be heard before the district court; and there is no provision of law authorizing such a remonstrance to be heard before the board of county commissioners. **Curtis v. Com'rs of Sequoyah Co.** 471

7. **Same—Review.** Record held not sufficient to disclose the grounds for a verbal remonstrance to the refunding proceedings, or that the court committed error in overruling the same. **Idem** 471

8. **County Seat Election—Corruption.** Under Const. art. 17, sec. 6, finding of referee in a county seat election contest that one of the contestants so debauched the electorate of two precincts as to prevent a fair election, and that it was not entitled to have counted for it the votes received therein, approved. **Incorporated Town of Bristow v. City of Sapulpa** 484

9. **Same—"Votes Cast."** A finding by a referee in a county seat election contest that but six votes cast at certain precincts out of the total of 508 were disqualified, and that this number should not be counted as going to make up the total number of votes cast, approved. **Idem** 484

10. **Same.** In a county seat election contest, where the votes for a contestant in certain precincts are thrown out because of fraudulent practices, the votes of the precincts except those of disqualified voters will be counted in determining the whole number of votes and the number required to determine the question. **Idem** 484

11. **County Seat Elections—Bribery.** An offer of the mayor and city council of a city seeking designation as permanent county seat to lease to the county for courthouse and jail purposes for ten years, at $10 per year, a building worth $3,000 per year, constitutes, under Const. art. 17, sec. 7, bribery. **City of Tecumseh v. City of Shawnee** 494

12. **Same—Effect on Election.** Where municipal authorities, to induce voters to favor the city for a permanent county seat, offer to the county a building for ten years for $100, the rental value

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COUNTIES—Continued.

of which is $3,000, and a large campaign fund is raised and the expenditure thereof unaccounted for, and certain voters are shown to have been bribed, the election will be set aside. **Idem** 494

13. **Indebtedness—Warrant.** One of a series of warrants in a certain form, attached to a rental contract, held payable on presentment to the county treasurer without further auditing or demand, provided the terms of the contract therein described have been complied with. **National Bank of Commerce of Guthrie v. Lee** 641

14. **County Seat—Removal—"Place."** The word "place," as used in Williams' Ann. Const. art. 17, sec. 6, par. 324, relating to removal of county seats, means a definite locality competent to be voted upon for a county seat. **Delaware County v. Hogan** 791

15. **Same—Situation of Buildings—Townsites.** Where ten acres marked by metes and bounds, designated as a "place," was selected by the electors as the county seat, and such territory with contiguous territory was incorporated, mandamus will lie to compel county officers to occupy with their records a building selected for the purpose by the county commissioners in the townsite outside the ten acres. **Idem** 791

COUNTY ATTORNEYS—See "Prosecuting Attorneys."

COUNTY SEATS—See "Counties."

COURTS—See "Appeal and Error," 4, 54; "Clerks of Courts"; "Counties," 6; "Criminal Law"; "Equity;" "Habeas Corpus"; "Indians," 2, 9-11; "Justices of the Peace"; "Mandamus," 3; "Officers"; "Prohibition"; "Removal of Causes"; "Statutes," 4-6.

1. **Decisions—Controlling Effect.** As to cases pending in the territorial courts in Indian Territory and Oklahoma Territory at the time of the erection of the state, the decisions of the Supreme Court of the United States are controlling. **Fidelity & Deposit Co. of Maryland v. Rankin** 8

2. **Jurisdiction—Title to Real Property.** The district courts of the state have jurisdiction of actions in ejectment and of actions to remove cloud from title; and the county courts of the state have no jurisdiction of such actions, for the reason that they call into question or dispute title to real estate. **Austin v. Chambers** 40

3. **Supreme Court—Following Criminal Court of Appeals.** It is a settled policy of this court to follow the construction given to criminal statutes by the Criminal Court of Appeals, since the enforcement of such statutes must be in accordance with such construction, and the same rule applies as to the determination of the constitutionality of a criminal statute. **State ex rel. v. Russell, Judge** 141
Ex parte Anderson 216
Ex parte Lightle 223
Ex parte Rial 224
Ex parte Spurlock 225

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COVENANTS:

1. **Warranty of Title—Breach.** The grantee can recover for breach of warranty, though both parties knew of the lack of title. **Joiner v. Ardmore Loan & Trust Co.** 266

2. **Same.** A covenant holding lands to the grantee, his heirs and assigns in fee simple forever, and an agreement that grantor is lawfully seised in fee, is an assurance that the vendor has perfect title, which is not limited by special warranty, unless the language of the deed taken together shows the intent to give a special and limited warranty. **Idem** 266

3. **Same.** Where a grantor under general covenants of title conveys land of which it has no title, breach of the covenant occurs when made. **Idem** 266

CRIMINAL LAW—See "Constitutional Law"; "Courts"; "Habeas Corpus"; "Statutes," 4-6.

1. **County Superior Courts—Misdemeanor Jurisdiction—Constitutionality of Act.** Act March 6, 1909 (Laws 1909, c. 14, art. 7), creating a county superior court for each county having a population of 30,000 and a city therein of 8,000, is not in conflict with Const. art. 7, sec. 12, in conferring misdemeanor jurisdiction on such court. **Ex parte Anderson** 216
Ex parte Lightle 223
Ex parte Rial 224
Ex parte Spurlock 225

2. **Judgment—Correction.** Where a defendant is tried, convicted, and sentenced to imprisonment, but, by the error of the clerk, the judgment is not entered on the records of the court, the error may be corrected at any time by an order **nunc pro tunc. Ex parte Riggert** 303

3. **Execution of Sentence—Imprisonment.** The prisoner having been formally convicted, and not having served his sentence, and the judgment of conviction not being stayed as provided by law, he may be apprehended as on escape and placed in custody on the unexecuted judgment. **Idem** 303

CUSTOMS AND USAGES—See "Pleading," 9.

Evidence. As a general rule, evidence of usages and customs may not be resorted to to interpret a contract, unless there is ambiguity or uncertainty upon the face of the instrument arising out of the terms used by the parties. **A. L. Jones & Co. v. Cochran** 431

D.

DAMAGES—See "Appeal and Error," 8; "Breach of Marriage Promise"; "Master and Servant"; "Parent and Child"; "Railroads."

DEEDS—See "Covenants"; "Vendor and Purchaser"; "Witnesses."

General Warranty—Presumption. It is a presumption of law that one conveying by a general warranty deed holds the original grant. **West & Russell v. Rawden** 399

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DEFECT OF PARTIES—See "Parties."

DEMURRER—See "Appeal and Error," 6; "Pleading"; "Trial."

DEPOSITORS' GUARANTY FUND—See "Banks and Banking."

DEPOSITS—See "Banks and Banking."

DEPOTS—See "Railroads."

DESCENT AND DISTRIBUTION—See "Indians."

DISMISSAL—See "Appeal and Error."

DIVORCE:

1. **Judgment—Construction.** Section 6182, Comp. Laws 1909, which provides that "every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time," must be considered to apply only to that portion of section 6180 of the same chapter which relates to appeals and remarrying within six months following the date upon which the divorce was granted. **Barnett v. Frederick** 49

2. **Alimony—Conveyance to Defeat.** Under Comp. Laws. 1909, secs. 1213, 2932, a conveyance to hinder creditors is void as against all creditors; and, where a husband against whom there is pending a suit for divorce transfers real estate to a party who takes the same with knowledge of the rights of the wife and of the intent to deprive her of alimony, the transfer is void. **Buffalo v. Letson** 261

3. **Same—Injunction.** Where an execution issued on a judgment of a divorced wife is levied on real estate, fraudulently conveyed by the husband to defeat the wife's rights, the good faith of the conveyance may be determined in a suit by the wife to enjoin. **Idem** 261

DOWER:

Assignment—Report of Master—Sufficiency of Evidence. In an action by a widow to have dower set apart to her, the report of a master as to parties who were heirs of the decedent held against the preponderance of the evidence. **Curry v. McDaniel** 19

E.

EJECTMENT—See "Courts"; "Indians," 2.

1. **Recovery for Improvement.** A judgment for the value of improvements made by an unsuccessful defendant in an action in the nature of ejectment cannot be allowed in that action, but recovery, if had at all, must be had under the provisions of sections 596-602 (sections 4794-4800) art. 25, c. 66, Wilson's Rev. & Ann. St. 1903; section 6128-6134, Comp. Laws 1909. **Wolcott v. Smith** 249

2. **Same—Procedure.** Application for the benefit of this act may be made by claimant on a return of the mandate of the Supreme Court in the action of ejectment. **Idem** 249

ELECTIONS—See "Clerks of Courts"; "Counties"; "Injunction"; "Mandamus"; "Prohibition"; "Schools and School Districts."

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EMINENT DOMAIN:

Proceedings to Take Property—Notice to Owners. In condemnation proceedings under Act Cong. Feb. 28, 1902, a notice "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the owners, was void, and conferred no jurisdiction. **Bruner v. Ft. Smith & W. R. Co.** 711

EQUITY—See "Counties," 5; "Dower"; "Injunction"; "Municipal Corporations," 4, 5; "Pledges"; "Quieting Title."

Reference—Report—Conclusiveness. Under the law in force in the Indian Territory prior to statehood, where a cause was referred to a master over objection for any purpose other than to take testimony and state an account, the report is persuasive only and should not be sustained if against the preponderance of the evidence. **Curry v. McDaniel** ---------- 19

ESTATES OF DECEDENTS—See "Descent and Distribution"; "Dower"; "Indians"; "Statutes," 3; "Taxation."

EVIDENCE—See "Breach of Marriage Promise"; "Carriers," 7-9; "Customs and Usages"; "Pleading," 9; "Trusts"; "Witnesses."

Review—See "Appeal and Error."

1. **Parol Evidence—Written Contract.** Where a party sells an article with a clause of warranty, the vendee, in an action for breach of the contract, cannot show prior parol agreements and warranties additional to those set out in the written contract. **Hercules Buggy Co. v. Hinde**---------- 85

2. **Same.** Where B. conveyed his stock of goods to a bank to pay a pre-existing debt, with covenants of warranty, in a suit against him and the bank for goods sold prior to the bill of sale, parol evidence that the cashier of the bank had agreed with B. before the sale to pay the debt in controversy is inadmissible. **Farmers' Nat. Bank of Durant v. Ardmore Wholesale Grocery Co.**---------- 769

3. **Opinions—Matters Directly in Issue.** In an action for the price of gin machinery, where defendant pleads breach of warranty, though defendant may show every fact which would support his claim that the machinery did not fulfill the warranty, he must show the same by facts, and not by the statement of mere conclusions. **Bilby v. Thomas Gin-Compress Co.**---------- 254

4. **Same.** In an action for the price of gin machinery, where defendant pleaded breach of warranty, testimony of a witness that the machinery was exactly as represented was inadmissible as being a determination of the specific issues then on trial. **Idem** 254

EXCEPTIONS—See "Appeal and Error," 5, 18, 40; "Trial."

EXECUTION—See "Sheriffs and Constables."

EXEMPTIONS—See "Homestead"; "Indians," 5; "Taxation."

EXPRESS COMPANIES—See "Carriers," 7.

EXTRADITION—See 'Habeas Corpus."

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F.

FINDINGS—See "Appeal and Error."

FIRE INSURANCE—See "Insurance."

FIXTURES:

1. **Annexation to Realty—Intention.** Chattels may be annexed to real estate and still retain the character of personal property; the intention with which they are annexed being one of the circumstances which may determine such character. **Lawton Pressed Brick & Tile Co. v. Ross-Kellar Triple Pressure Mach. Co.** 59

2. **Same—Sale of Machinery—Rights of Third Parties.** A contract of conditional sale of machinery **held** to fully express the purpose that the annexation of the machinery should not make it a part of the real estate, so as to have that effect without any concurring intention of a subsequent purchaser of the land. **Idem** 59

FORCIBLE ENTRY AND DETAINER:

When Maintainable. Under the statutes of this state, in the absence of the relation of landlord and tenant, a person who has never been in possession of the premises in controversy cannot maintain an action of forcible entry and detainer against one in possession under color of title. **Link v. Schlegel** 458

FORECLOSURE—See "Mortgages."

FORGERY—See "Banks and Banking"; "Guaranty."

FRANCHISES—See "Carriers," 16; "Municipal Corporations," 10.

FRAUD—See "Brokers"; "Indians," 1; "Trusts."

FRAUDS, STATUTE OF—See "Pleading," 2-4; "Trusts."

1. **Performance of Contract.** Performance by plaintiff of agreement to support her father and stepmother during their natural lives **held** to take their agreement to transfer land to her out of the statute of frauds. **Purcell v. Corder** 68

2. **Assignment of Three-Year Lease.** An oral assignment, at the end of one year, of a lease for three years is in violation of the statute of frauds (Comp. Laws 1909, sec. 1089), and void. **Tyler Commercial College v. Stapleton** 305

3. **Same—Effect of Performance.** An oral assignment at the end of one year of a lease for three years is relieved from the operation of the statute of frauds by the acts of the assignee in going into possession and paying for a time the monthly rentals. **Idem** 305

4. **Promise to Answer for Debt of Another—Primary or Collateral.** An oral promise to pay for advancements to be made to another, creating primarily a liability on the part of the promisor, is not within the statute of frauds; but if the intention was that the promissor should only be collaterally liable, and pay only in case of default, then the contract would be void under the statute of frauds. **Richardson v. Parker, McConnell & Co.** 339

5. **Same—Question for Jury.** Evidence **held** to present a question of fact whether a promise to pay for advancements to be made to another was primary or collateral. **Idem** 339

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FRAUDULENT CONVEYANCES—See "Bankruptcy"; "Divorce."

G.

GARNISHMENT—See "Judgment."

GAS—See "Guardian and Ward"; "Municipal Corporations," 10.

GUARANTY:

1. **Construction of Contract—Indorsement of Check.** The guaranty of an indorsement on a check applies only to the indorser, and does not protect the drawee against the risk of cashing a check to which the maker's name is forged. **Cherokee Nat. Bank v. Union Trust Co.** 342

2. **Distinguished From Other Transactions—Assignment.** Where a county warrant or certificate in favor of two individuals is endorsed by them, and by the partnership of which they are members, and assigned to a bank under a contract stating that the individuals, as a partnership, are the owners thereof, the signature of the partnership and of the partners will be presumed to have been placed on the indorsement to assign the warrant or certificate, and not to guarantee its payment. **National Bank of Commerce of Guthrie v. Lee**..... 641

GUARANTY FUND—See "Banks and Banking."

GUARDIAN AND WARD—See "Insane Persons."

1. **Oil and Gas Lease—"Sale of Realty."** A lease granting oil and gas mining privileges for a term of years is not a sale of realty within Comp. Laws 1909, sec. 5314, relating to sales by guardians. **Duff v. Keaton**..... 92
Allen v. Midway Oil & Gas Co...... 91

2. **Same—Validity—Collateral Attack.** Lease for oil and gas mining privileges for a term of years by a guardian, with permission of court, approved and confirmed by the court, though without preliminary notices essential in cases of sale of real estate, **held** valid against collateral attack. **Idem**.....92, 91

H.

HABEAS CORPUS—See "Quieting Title."

1. **Appeal—Extradition.** An appeal does not lie to the Supreme Court from an order in **habeas corpus** remanding a party held for extradition for a criminal offense. **Ex parte Logan**..... 659

2. **Supreme Court—Original Jurisdiction.** The Supreme Court has original jurisdiction of an application for a writ of **habeas corpus.** **Ex parte Deickman** 749

3. **Contempt—Void Order.** Where petitioner was imprisoned for contempt in failing to obey a void order, petitioner was entitled to release on **habeas corpus. Idem**..... 749

HAIL INSURANCE—See "Insurance."

HARMLESS ERROR—See "Appeal and Error."

HEIRS—See "Descent and Distribution"; "Dower"; "Indians."

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HIGHWAYS—See "Bridges."

Road Districts—Taxation—Constitutionality. Sess. Laws 1910-11, c. 124, providing for the formation of road districts, improvement of public highways, and issuance of bonds, is repugnant to Const. art. 10, sec. 9, and a road district formed thereunder cannot levy and collect an **ad valorem** tax to pay interest on or create a sinking fund for the payment of road bonds. **Thompson v. Rearick** 283

HOMESTEAD—See "Indians," 15.

Lands Adjoining Town. Land adjoining an incorporated town, the trustees of which have not extended the boundaries thereof so as to include such land, is within Williams' Const. art. 12, sec. 1, providing that a homestead not within the municipality shall consist of not more than 160 acres. **Pumroy v. Buck** 456

HUSBAND AND WIFE—See "Divorce"; "Dower"; "Witnesses."

HYPOTHETICAL QUESTIONS—See "Appeal and Error," 3.

I.

IMPRISONMENT—See "Criminal Law"; "Habeas Corpus"; "Quieting Title."

IMPROVEMENTS—See "Ejectment."

INDIANS—See "Taxation."

1. **Allotments — Contests — Notice — Fraud—Vacation of Judgment.** Under Act Cong. July 1, 1902, the Commissioner to the Five Civilized Tribes and the Secretary of Interior on appeal have power, before the issuance of a patent to Cherokee allottee, to cancel a judgment of the commissioner entered without notice to contestee on false affidavit showing notice. **Lynch v. Harris** 23, 36
Lynch v. Garland 144

2. **Jurisdiction—Title to Realty.** The district court has jurisdiction of an action in ejectment or to remove cloud from title by heirs, against the beneficiary of a will of a deceased Indian, probated before the admission of the state into the Union, affecting allotted lands of the Indian, where the heirs contend that the will did not devise the land, and that, if it attempted to do so, it was invalid. **Austin v. Chambers** 40

3. **Lands—Inheritance—Death Before Allotment.** Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment or a certificate of selection therefor, **held** that he died seised of no estate of inheritance therein. **Brady v. Sizemore** 169

4. **Same.** Where a duly enrolled citizen of the Creek Nation died March 1, 1901, before receiving his allotment for which on August 23, 1902, certificate of selection issued to his heirs, Mansf. Dig. secs. 2522-2545 (Ind. T. Ann. St. 1899, secs. 1820-1843), governs the devolution of the allotment as provided by Indian Appropriation Act and Creek Supplemental Agreement, sec. 6. **Idem** 169

5. **Allotments—Exemption.** The exemption of lands, allotted under an act approved July 1, 1902 (Act July 1, 1902, c. 1362, 32 St. at L. 641), known as the Supplemental Agreement between the Choc-

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INDIANS—Continued.

taw and Chickasaw Nations and the United States, from any "debt * * * contracted prior to the time at which said land may be alienated," does not exempt them from liabilities for the torts of the allottee perpetrated prior to the allotment. **Simmons v. Mullen** ---------- 184

6. **"Alienable"—"Inalienable"—Disposition by Will.** The words "alienable" and "inalienable," used to restrict the disposition of lands in the Supplemental Agreement with the Chickasaws and Choctaws (Act Cong. July 1, 1902), include disposition by will. **Taylor v. Parker**---------- 199

7. **Restriction of Alienation—Wills.** Act Cong. April 28, 1904, made laws of Arkansas in force in the Indian Territory applicable to Indians and their property, so far as alienable under the acts of Congress, but did not operate to remove any of the restrictions theretofore placed on all lands of Indians by act of Congress. **Idem** 199

8. **Lands—Inheritance—What Law Governs.** Chapter 49 of the Laws of Arkansas (Mansf. Dig.), entitled "Descent and Distribution," controls the descent of land allotted to a member of the Seminole Tribe of Indians, not of Indian blood, who died on the 23d day of August, 1903, after receiving his allotment. **Heliker-Jarvis Seminole Co. v. Lincoln**---------- 425

9. **Jurisdiction—Osage Reservation.** Act Cong. June 7, 1897, fixes the territorial jurisdiction of the district court at Pawhuska in civil actions in which a member of the Osage and Kansas Tribes of Indians is a defendant as coextensive with the limits of the Osage reservation, and does not require that the defendant must reside upon lands the Indian title to which has not been extinguished. **De Noya v. Hill Inv. Co.**---------- 663

10. **Same.** The district court at Pawhuska, under Act Cong. June 7, 1897, has jurisdiction of a civil action, the defendant in which is a member of the Osage Tribe of Indians residing in the town of Pawhuska on a lot the Indian title to which has been extinguished. **Idem** ---------- 663

11. **Same—Suits by Indian Traders.** Act Cong. March 3, 1901, affords to Indian traders at the Osage agency a cumulative remedy for the collection of their accounts against the Osage Indians, and does not oust the district court at Pawhuska of jurisdiction of an action on a note executed by an Osage Indian to an Indian trader, instituted March 6, 1907, where the note had not been presented to the Secretary of the Interior for adjustment under such act. **Idem**---------- 663

12. **Lands—Descent and Distribution.** Where a Creek citizen, living March 1, 1899, died after the passage of Act March 1, 1901, but was thereafter enrolled and an allotment issued in her name, and the land patented to her heirs, the land descended, under Act Cong. March 1, 1901, sec. 28, to her heirs as though she had received title during her lifetime. **Ground v. Dingman**----- 760

13. **Same.** Where a Creek citizen died intestate, leaving a surviving husband and an infant son, who died without issue, after which the husband died intestate, without issue, leaving two sisters as his only heirs, the land patented to the heirs of such citizen passed,

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INDIANS—Continued.

under Act Cong. March 1, 1901, sec. 28, on the death of the husband and infant son, to the husband's sisters. **Idem**..... 760

14. **Lands — Conveyance — "Allottees."** The word "allottees," as used in Act April 21, 1904, c. 1402, 33 Stat. 204, refers to the parties to whom an allotment is made, and not to their heirs; and where the allottee could alienate his land, had he lived, it is alienable by his heirs, without reference to their blood. **Parkinson v. Skelton** 813

15. **Same—Homestead.** Where a white man, duly enrolled as a member of the Creek Tribe, received his allotment, and died intestate, without issue, early in 1900, and thereafter a patent was issued to his heirs, the homestead quality did not attach, and any restrictions on alienation of the land were removed by 33 Stat. 204, and the heirs could thereafter convey the land. **Idem**..... 813

INDORSEMENT—See "Banks and Banking"; "Bills and Notes"; "Guaranty."

INFANTS—See "Parent and Child."

INHERITANCES—See "Indians"; "Statutes," 3; "Taxation."

INITIATIVE AND REFERENDUM—See "Statutes," 7.

INJUNCTION—See "Constitutional Law"; "Counties," 5; "Divorce"; "Mandamus," 3; "Municipal Corporations," 5; "Waters and Water Courses."

1. **Subjects of Relief—Holding Election.** A court of equity has no jurisdiction to restrain the holding of an election, since the right involved is a political one. **Copeland v. Olsmith, Mayor**..... 106

2. **Petition—Misjoinder of Parties—Water Rights.** Petition to enjoin action of the state engineer and an applicant for water rights is not subject to the charge of misjoinder of parties because there are joined therein all the parties claiming a right to the water along with the state engineer, and the relief asked against him is different from that asked against his codefendant. **Gay v. Hicks** 675
Gay v. Wallace..... 687

INSANE PERSONS:

1. **Statutes — Definition of Terms.** The words "incompetent," "mentally incompetent," and "incapable," used in Comp. Laws 1909, secs. 5485, 5486, mean any person who, though not insane, is for any cause unable to properly manage and take care of himself or his property. **Shelby v. Farve**..... 651

2. **Guardian of Estate Alone.** Under Comp. Laws 1909, secs. 5485, 5486, the county court can appoint a guardian of the estate alone of a person mentally incompetent to manage the same. **Idem** 651

INSOLVENCY—See "Bankruptcy."

INSTRUCTIONS—See "Appeal and Error," 49; "Breach of Marriage Promise"; "Trial."

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INSURANCE—See "Appeal and Error," 53; "Quo Warranto."

1. **Hail Policy—Proofs of Loss—Waiver.** A stipulation in a hail policy that insured shall within 60 days after loss make proof of same to the insurance company is waived where the insurer received and retained insufficient proof without specific objection to any defects therein. **St. Paul Fire & Marine Ins. Co. v. Griffin** 178

2. **Construction of Fire Policy—Unconditional and Sole Ownership.** The holder of the naked legal title to property, without any beneficial use or interest therein, has not the unconditional and sole ownership of the property, within the meaning of a provision of a policy of fire insurance providing that the entire policy shall be void if the interest of the insured be other than unconditional and sole ownership of the property insured. **Des Moines Ins. Co. v. Moon** 437

Cosmopolitan Fire Ins. Co. v. Moon 445

3. **Same—Waiver by Agent.** A provision of a fire insurance policy executed in the Indian Territory before admission of the state, providing for sole and unconditional ownership, **held** not waived because the agent, countersigning the policy, knew that insured did not have such ownership, in view of a condition in the policy that no agent could waive any condition therein, unless the waiver was written on the policy. **Idem** 437, 445

INTERSTATE COMMERCE—See "Carriers," 1.

IRRIGATION—See "Waters and Water Courses."

J.

JUDGES—Authority as to Case-Made—See "Appeal and Error," subtit. "Record."

JUDGMENT—See "Appeal and Error," 1, 2, 4, 10, 55-57; "Criminal Law"; "Divorce"; "Habeas Corpus"; "Indians," 1; "Justices of the Peace"; "Mandamus," 10; "Mortgages"; "Pleading," 7.

1. **Nothwithstanding Verdict—Garnishment of Mortgaged Property—Tender of Amount Due.** Where summons in garnishment on a judgment against A. was served on B. and issue joined under Comp. Laws 1909, sec. 5718, and the jury found that the property in possession of the garnishee was held by him under mortgage, and no payment or tender of the amount of the mortgage debt was made to the garnishee as required by section 4432, defendant's motion for judgment notwithstanding verdict for plaintiff should have been sustained because of such defect. **Bailey v. Willoughby** 194

2. **Joint Obligation.** Under the Oklahoma practice prior to statehood, where the obligation sued on is joint, the court may render judgment against one of two defendants; the other not having been served. **Connor v. Tailor & Leaverette** 733

JURISDICTION—See "Appeal and Error," 4; "Courts"; "Eminent Domain"; "Indians," 2, 9-11; "Injunction"; "Justices of the Peace"; "Telegraphs and Telephones."

JURY—See "Constitutional Law"; "Mandamus," 3; "Statutes," 4-6.

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JUSTICES OF THE PEACE—See "Appeal and Error," 4.

1. **Appeals—Final Judgment.** An appeal will not lie from justice court after verdict and refusal of a new trial, in the absence of entry of judgment, but will lie only from a final judgment. **Awad v. Shouse** ---------- 56

2. **Same—Amendment of Transcript.** Where a party appeals from justice court after verdict and refusal of new trial, it is permissible for the justice to enter judgment in his docket and amend the transcript to show its rendition, thereby conferring jurisdiction on the county court. **Idem**---------- 56

3. **Delay in Judgment—Effect on Appeal.** Where the justice fails to render judgment on or before the fourth day after the close of the trial, contrary to Wilson's Rev. & Ann. St. 1903, sec. 5039, **held** error, but that the same could not affect the right of plaintiff to perfect his appeal therefrom by filing his appeal bond in the county court within ten days from the date of the judgment when rendered. **St. Paul Fire & Marine Ins. Co. v. Griffin** 178

L.

LANDLORD AND TENANT—See "Counties," 13; "Forcible Entry and Detainer"; "Frauds, Statute of."

1. **Assignment of Lease—Liability of Assignee.** The assignee of a lease is liable to the lessor by reason of privity of estate for rents on the demised premises, so long as the privity of estate continues. **Tyler Com. College v. Stapleton**---------- 305

2. **Same.** An assignee cannot, by mere abandonment of possession of the premises, without an assignment of the lease, avoid liability for rents. **Idem**---------- 305

3. **Rent—Abandonment by Tenant.** Where a tenant, a national bank, goes into voluntary liquidation under the national banking laws, and abandons leased premises before the expiration of the term of the lease, the landlord is not required to relet for the protection of the tenant, but may, at his election, suffer the premises to remain vacant and recover his rent for the remainder of the term by means of an action on the lease. **National Exchange Bank v. Hahn** ---------- 516

LARCENY—See "Limitation of Actions."

LEASES—See "Brokers"; "Frauds, Statute of"; "Guardian and Ward"; "Landlord and Tenant"; "Property."

LIENS—See "Pledges"; "Mortgages"; "Witnesses."

LIMITATION OF ACTIONS:

Bona Fide Purchaser—Stolen Property. Limitations (Mansf. Dig. sec. 4478 [Ind. T. Ann. St. 1899, sec. 2945]) as to personal property stolen run in favor of an innocent purchaser against the true owner from the time the property is taken possession of, and are a bar when the same has been held openly for three years. **McGehee v. Alexander** ---------- 699

LIVE STOCK—See "Animals."

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LOANS—SEE "Brokers."

LUNATICS—See "Insane Persons."

M.

MANDAMUS—See "Counties," 15; "Municipal Corporations," 6; "Schools and School Districts"; "States."

1. **Proceedings—Accrual of Cause of Action.** The issue to be tried and determined in mandamus is that raised by the writ and answer, and the nonexistence of a cause of action when a suit is brought is a fatal defect which cannot be cured by the accrual of a cause while the suit is pending. **Kerr, County Clerk, v. State ex rel.** 110

2. **Contest of Office—Irregularities in Election.** In mandamus by an officer elected under a new city charter against an officer elected under the old charter, the respondent cannot contest title on the ground of the invalidity of the municipal election, because of failure to hold a primary election, or other irregularities in holding the election. **Adler v. Jenkins** 117

3. **Subjects of Relief—Trial by Jury.** Mandamus may issue to require a judge of the district court to grant a "person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint made or entered by" such court or judge, a trial by jury, "before penalty or punishment is imposed." **McKee v. De Graffenreid** 136

4. **Parties—Commissioner of Charities and Corrections.** The right of the Commissioner of Charities and Corrections to bring suit on her own relation, in the name of the state, to mandamus the board of county commissioners to pass upon the qualifications of a probation officer appointed by the county court, and to certify the same back to the county court, if not expressly authorized by constitutional or statutory authority, is fairly inferred, being commensurate with her trust. **Sullins v. State ex rel.** 526

5. **Subjects of Relief—Acts of Officer.** Where a board of county commissioners, to whom was referred an appointment by the county court of a person as probation officer, refused to determine whether the proposed appointee was a discreet person of good character and qualified, under an act approved March 24, 1909 (article 8, c. 14, p. 188, Sess. Laws 1909), for the office, but determined that it was inexpedient to confirm said appointment, **held**, that said board of county commissioners may be ordered by mandamus to pass upon the qualifications of said officer and certify the same to the county court. **Idem** 526

6. **Proceedings—Quashing Writ.** A motion to quash a peremptory writ of mandamus, issued without notice, will be sustained, where the writ was improperly or improvidently granted. **Idem** 526

7. **Elections—Names on Ballots.** Under Comp. Laws 1909, sec. 3266, as amended by Sess. Laws 1909, c. 16, art. 4, a person cannot by mandamus compel the state election board to place upon the official ballot for the general election his name as a nominee of a political party, where it was not printed on the ballots of the party at the primary election, though he filed his petition in time to have it printed on the tickets of such party as a candidate for the office. **Persons v. Penn** 581

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MANDAMUS—Continued.

8. **Other Remedy—Quo Warranto.** A defeated candidate who complains that the returns canvassed by the State Election Board were fraudulently made by the county election board has a remedy by quo warranto against the holder of the nomination. **Roberts v. Marshall** ---------- 716

9. **Acts of Officers—Election Board—Recanvass of Returns.** Where the State Board has canvassed the returns by the county election boards constituting a legislative district, has declared the result, and issued a certificate of nomination, it cannot be compelled by mandamus to recanvass another set of returns subsequently certified by a county election board. **Idem**---------- 716

10. **Appeal—Decisions Reviewable.** From a final judgment of a judge of the district court at chambers, on a trial on its merits of an application for a writ of mandamus, appeal lies to the Supreme Court. **Delaware County v. Hogan**---------- 791

MARRIAGE—See "Breach of Marriage Promise"; "Divorce."

MASTER AND SERVANT—See "Carriers," 15.

1. **Injuries to Third Persons—Who Are Servants.** Laborers engaged to use their employer's truck and to truck a car load of flour from the sidewalk into a building are servants, and not independent contractors. **Hamilton v. Oklahoma Trading Co.**---------- 81

2. **Injuries to Servant—Existence of Relation.** One who, at the request of a conductor in charge of a freight train, an emergency existing reasonably requiring such assistance, temporarily assists in the work of the carrier in the unloading of a safe from one of its cars, the regular crew not being reasonably able to unload same, is, for the time being, the servant of the defendant and entitled to the same protection as any other servant. **St. Louis & S. F. R. Co. v. Bagwell**---------- 189

MINES AND MINERALS—See "Brokers"; "Guardian and Ward"; "Property."

MINORS—See "Parent and Child."

MISCONDUCT IN OFFICE—See "Officers."

MOOT QUESTIONS—See "Appeal and Error," 3.

MORTGAGES—See "Brokers"; "Chattel Mortgages"; "Pledges"; "Witnesses."

Foreclosure—Maturity of Debt. Where a mortgage securing two notes provided that on default on the first note the mortgagees might declare the whole debt due, the mortgagees could foreclose and secure a personal judgment on default in either note, though they were separate contracts. **Phillips v. Williams**---------- 766

MUNICIPAL CORPORATIONS—See "Bridges"; "Carriers," 12-14, 16; "Counties"; "Homestead"; "Mandamus," 2; "Railroads"; "Schools and School Districts"; "Telegraphs and Telephones."

1. **Sewerage Contracts—Statutes.** Wilson's Rev. & Ann. St. 1903, sec. 416, held not to limit a city council to extension or construc-

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MUNICIPAL CORPORATIONS—Continued.

tion of lateral sewers by employment of laborers, or by permission of lot owners to do the work themselves, but to authorize provision for such construction by contract for the work as a whole. **Jones v. Whitaker** 13

2. **Public Improvements—Necessity of Ordinance.** Under Wilson's Rev. & Ann. St. 1903, sec. 416, authorizing municipalities to provide for public improvements by ordinance, the municipality can not provide therefor by resolution. **Idem** 13

3. **Same—Apportionment of Levy.** Under Wilson's Rev. & Ann. St. 1903, sec. 416, apportionment of levy for municipal improvement equally held not authorized. **Idem** 13

4. **Same—Wrongful Assessment—Effect.** An owner of property can not refuse to pay a total assessment for municipal improvement, where it is clear that he ought to pay a part and it can be seen what that part is. **Idem** 13

5. **Same.** The rule that an owner will not be permitted to refuse payment of an assessment where he ought to pay a part has no application where the entire assessment is illegal, and in such case it may be enjoined without tender of any portion. **Idem** 13

6. **Contest of Office—Mandamus—Validity of Charter.** In mandamus by an officer holding **prima facie** evidence of title from a municipal election under a new charter against an officer holding under the old charter, the invalidity of the new charter for failure to comply with Const. art. 18, sec. 3, cannot be asserted. **Adler v. Jenkins** 117

7. **Charter—Construction—Abolition of Offices.** A municipal charter adopted under Const. art. 18, authorizing the mayor to appoint a city treasurer subject to confirmation by the commissioners, and providing that the commissioner at the head of each department shall within fifteen days after qualification submit nominations for each of the offices under his department, abolished the office of city treasurer under the old charter and re-created the office as an appointive office. **Idem** 117

8. **Bonds—Issuance—Approval by Attorney General.** Bonds issued by a municipal corporation under Comp. Laws, secs. 722-733, to raise funds with which to make street improvements, which are to be paid by special assessments, are not public securities or bonds, within Act of March 24, 1910 (Laws 1910, c. 94) sec. 2, and such bonds are not required to be filed and certified to by the Attorney General as **ex officio** bond commissioner. **City of Lawton v. West** 395

9. **Towns—Extension of Boundaries.** Lands adjoining an incorporated town which have been laid off and platted do not thereby become annexed thereto and form a part thereof, unless the trustees by resolution of their board extend the boundary of such town so as to include such lands, as provided by section 873, Comp. Laws 1909. **Pumroy v. Buck** 456

10. **Natural Gas Franchises—Validity.** A franchise for furnishing natural gas, granted by a municipality to an individual, is void under Comp. Laws 1909, secs. 4844-4846, permitting such grant to domestic pipe line corporations only. **Henry v. Bartlesville Gas & Oil Co.** 473

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N.

NEGLIGENCE—See "Banks and Banking"; "Master and Servant"; "Parent and Child"; "Railroads."

NEGOTIABLE INSTRUMENTS—See "Bills and Notes."

NEWSPAPERS—See "Appeal and Error," 44; "Publication."

NEW TRIAL—See "Appeal and Error"; "Justices of the Peace."

NOTES—See "Bills and Notes."

NOTICE—See "Animals"; "Appeal and Error," 22, 23, 44; "Bankruptcy"; "Carriers," 2-6; "Eminent Domain"; "Guardian and Ward"; "Indians," 1.

O.

OFFICERS—See 'Animals"; "Appeal and Error," 44; "Clerks of Courts"; "Counties," 3; "Mandamus"; "Municipal Corporations," 6, 7; "Prohibition"; "Quo Warranto"; "Schools and School Districts"; "Sheriffs and Constables"; "States"; "Statutes," 9.

1. **Misconduct—Actions—Jurisdiction—District Courts.** The prohibition in Const. art. 7, sec. 12, against the exercise by the county court of jurisdiction in actions against officers for misconduct in office, includes all actions against such officers for misconduct, and jurisdiction over such proceedings is in the district court. **State ex rel. v. Russell, Judge**..... 141

2. **Salaries—Constitutionality of Statutes.** There being no provision of statute or Constitution fixing compensation for the several clerks of the district court prior to Laws 1910, c. 69, the action of the special Legislature in fixing their compensation is not in conflict with Const. art. 23, sec. 10, forbidding statutes affecting salaries of public officers after election. **State v. Harper**..... 572

OIL AND GAS—See "Brokers"; "Guardian and Ward"; "Property."

ORDINANCES—See "Municipal Corporations," 2.

P.

PAROL EVIDENCE—See "Evidence."

PARTIES—See "Appeal and Error," 7-9, 25, 55-57; "Bills and Notes"; "Carriers," 11; "Injunction"; "Judgment"; "Mandamus," 4, 5; "Pledges"; "Quieting Title"; "Quo Warranto"; "Railroads"; "Sheriffs and Constables"; "States"; "Witnesses."

PARTNERSHIP—See "Brokers"; "Guaranty."

Fictitious Names—Publication—Action. Under Comp. Laws 1909, secs. 5023, 5025, publication by partnership, transacting business under fictitious name, of the names of the members of the firm, etc., must be had before any action can be brought by it in the courts. **Smith v. Woods**..... 233

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PARENT AND CHILD:

Negligence of Child—Liability of Parent. A father who authorized his minor son to use his automobile for the pleasure of the family is liable for the son's negligence in driving the automobile for such purpose with a friend who was a guest of the family. **McNeal v. McKain** ---------- 449

PATENTS—See "Sales."

PENALTIES—See "Sheriffs and Constables."

PERMANENT SCHOOL FUND—See "Banks and Banking."

PERSONAL INJURIES—See "Master and Servant."

PETITION—See "Pleading."

PETITION IN ERROR—See "Appeal and Error."

PLEADING—See "Appeal and Error," 1, 14, 45, 50, 53; "Bills and Notes"; "Corporations"; "Injunction"; "Removal of Causes"; "Trusts"; "Waters and Water Courses."

1. **Allegations in General—Surplusage.** Where the facts constituting the pleader's cause of action are fully set out in his petition, and are followed by a formal statement of his conclusions drawn from the facts stated, such conclusions, if erroneous, may be disregarded as surplusage. **Lawton Pressed Brick & Tile Co. v. Ross-Kellar, etc., Co.** ---------- 59

2. **Demurrer—Admissions—Statute of Frauds.** Though a demurrer admits the facts of a petition, yet, where an agreement is in parol, the defendant is entitled to the benefit of the statute of frauds, unless the part performance pleaded is sufficient to avoid its operation. **Purcell v. Corder** ---------- 68

3. **Same.** The effect of a demurrer to a petition pleading an oral agreement is the same as an answer admitting the agreement, but claiming the benefit of the statute of frauds. **Idem**---------- 68

4. **Same.** If the petition alleges such a part performance as will take the agreement out of the statute of frauds, the demurrer is such an admission of part performance as will preclude defendant from the benefit of the statute. **Idem**---------- 68

5. **Departure in Reply—Waiver.** Departure in a reply is waived by failure to move to strike. **Idem**---------- 68

6. **Same—Objections.** Departure in a reply cannot be taken advantage of by demurrer or by objection to the evidence. **Idem**------- 68

7. **Motions—Judgment on Pleadings.** Where the material averments of plaintiff's petition are denied by the answer of the defendant and facts pleaded showing the same to be untrue, it is error to render judgment for plaintiff on the pleadings. **Fenton v. Burleson** 230

8. **Amendments—Discretion of Trial Court.** Where an amended petition does not change substantially the original claim of the plaintiff it is not error for the trial court to allow it to be filed. **West & Russell v. Rawden**---------- 399

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PLEADING—Continued.

9. **Amendment—Refusal.** It is not error to refuse an amendment which will permit the party requesting the same to introduce evidence tending to establish a usage or custom which contravenes a written contract upon which the cause of action is predicated. **Drennan v. Warburton** 561

PLEDGES:

Assignment of Note as Collateral—Action by Pledgee. Where the payee of a nonnegotiable promissory note assigns it to a third party as security for a loan, and pays the loan pending suit on the collateral, the holder may nevertheless recover on the collateral note from the maker, unless the latter is thereby deprived of some equity which he may have had against the payee. **McNary v. Farmers' Nat. Bank** 1

PRACTICE—See "Appeal and Error"; "Trial."

PREFERENCE—See "Bankruptcy."

PRINCIPAL AND AGENT—See "Banks and Banking"; "Brokers"; "Insurance"; "Trusts."

PRINCIPAL AND SURETY:

1. **Remedies of Surety—Action Against Principal.** A surety may maintain an action against his principal, to compel him to discharge the debt or liability for which the surety is bound, after the same has become due. **Columbia Bank & T. Co. v. Fidelity & G. Co.** 535

2. **Construction of Contract.** Comp. Laws 1909, sec. 1569, relating to construction of obligations of a surety, guarantor, or indemnitor for hire, prescribes a rule of construction, but does not otherwise affect the rights of a surety, where there is no ambiguity in the contract of suretyship. **Idem** 535

PROBATION OFFICERS—See "Mandamus," 4, 5.

PROCESS—See "Summons."

Service by Publication—Sufficiency of Affidavit. An affidavit filed for the purpose of obtaining service by publication in which it is stated the defendant is a non-resident of the state of Oklahoma, and is a resident of the state of Indiana, without showing that service could not have been had upon the defendant within the state of Oklahoma, is insufficient to support service by publication. **Fenton v. Burleson** 230

PROHIBITION:

1. **Jurisdiction.** The district and superior courts of the state have power to issue writs of prohibition to inferior courts and bodies exercising judicial power to restran them from exercising powers not granted to them. **State ex rel. v. Vaughn** 384

2. **Nature of Remedy—Ministerial Functions.** The writ of prohibition will not lie to an executive or ministerial board to control or regulate it in the performance of a ministerial or executive function. **Idem** 384

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PROHIBITION—Continued.

3. **Judicial Powers—Primary Elections—Duties of Officers.** A county election board, in placing upon the ballots for a primary election the names of candidates for nomination by the different political parties for the different officers to be elected by the county, is engaged in the performance of a ministerial duty and does not exercise judicial power. **Idem** 384

PROMISSORY NOTES—See "Bills and Notes."

PROPERTY—See "Fixtures"; "Guardian and Ward."

Oil and Gas Lease—Personalty. A lease granting oil and gas mining privileges for a term of years is a chattel real which is personalty. **Duff v. Keaton** 92
Allen v. Midway Oil & Gas Co. 91

PROSECUTING ATTORNEYS—See "Counties," 3; "Quo Warranto."

PUBLICATION—See "Animals"; "Appeal and Error," 44; "Partnership"; "Process."

PUBLIC INDEBTEDNESS—See "Counties"; "Highways"; "Municipal Corporations"; "Schools and School Districts"; "States."

PUBLIC LANDS:

1. **Grants by United States—Acceptance by State.** Const. art. 11, sec. 1, provides for acceptance by the state of all grants of land and donations of money by the United States under the Enabling Act, for the purposes and upon the conditions and limitations named therein. **Haskell v. Haydon** 518

2. **Sale of School Lands.** Enabling Act, sec. 9, provides that sections 16, 36, and lands taken in lieu thereof, granted for the support of the common schools, if sold, may be appraised and sold in 160-acre tracts or less, under the rules and regulations prescribed by the Legislature; preference right to purchase being given to the lessee. **Idem** 518

3. **Same—Powers of Legislature.** Const. art. 11, sec. 4, confers on the Legislature exclusive power to prescribe the rules and regulations for the sale of public lands set apart to the state by Congress, and lands in lieu thereof, for charitable and other purposes. **Idem** 518

4. **Duties of Land Commissioners.** Const. art. 6, sec. 32, provides that the commissioners of the land office shall have charge of the sale, rental, disposal, and managing of school land and other public lands of the state. **Idem** 518

5. **Same—Size of Tracts.** There is no rule or regulation by the state Legislature requiring the commissioners of the land office to offer for sale indemnity lands in excess of 160 acres embraced in a school land lease, and to allow the lessee a preference right to purchase the entire tract at the highest bid. **Idem** 518

PUBLIC OFFICERS—See "Officers."

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Q.

QUARANTINE—See "Animals."

QUIETING TITLE:

Habeas Corpus—Equitable Relief—Decree—Contempt. In a suit to quiet title, in which the court had jurisdiction of defendant, it was error to decree that he should procure a conveyance from a non-resident, not a party to the proceedings, to complainant, and to order defendant's imprisonment for failure to comply with the command. **Ex parte Deickman** 749

QUO WARRANTO—See "Mandamus," 8.

Parties—Commissioner of Insurance—Forfeiture of Charter. The Commissioner of Insurance, by virtue of article 6, secs. 1, 22, and 23, of the Constitution, is authorized to bring suit in **quo warranto** in the district court to forfeit the charter of a corporation and oust it from doing business in the state, without the intervention of the county attorney. **State ex rel. v. Hooker** 522

R.

RAILROADS—See "Carriers."

1. **Regulation—Orders of Corporation Commission—Review.** On appeal from an order assessing a penalty under section 19, art. 9, Williams' Ann. Const. Okla., against a railway company for an alleged violation of an order of the Corporation Commission, the Supreme Court has jurisdiction to pass upon the power of the Commission to make the order violated, and whether it is reasonable and just, notwithstanding such an order is not appealable when made. **Gulf, C. & S. F. Ry. Co. v. State** 378

2. **Same—Interference With Interstate Commerce.** Order No. 148 of the Corporation Commission, requiring railroads to report accidents, is not violative of the commerce clause of the federal Constitution, and was not superseded by the act of Congress of May 6, 1910, c. 208, 36 St. at L. 350 (U. S. Comp. St. Supp. 1911, p. 1329). **Idem** 378

3. **Same—Reasonableness of Order.** As construed by the Corporation Commission, it cannot be said that Order No. 148 is unreasonable or unjust. **Idem** 378

4. **Injuries by Fire—Presumption of Negligence.** Proof that property has been destroyed by sparks from a locomotive creates a presumption of negligence of the railroad company or its employees. **St. Louis, I. M. & S. Ry. Co. v. Marlin** 510

5. **Same—Question for Jury.** Where it appeared that a fire was started on the right of way by a locomotive, **held** the province of the jury to determine whether the presumption of negligence was overcome. **Idem** 510

6. **Depots — Orders of Corporation Commission — Appeal — Parties.** Where the Corporation Commission ordered a railroad to establish a station at a certain point, only such persons as were affected by or interested in the service, convenience, or facilities at such point were entitled to appeal therefrom. **Wharton v. Miller** 771

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RAILROADS—Continued.

7. **Same.** Where the Corporation Commission required the location of a station at a certain point, that its maintenance would retard the growth of adjacent towns was insufficient to entitle persons interested in property in those towns to appeal from the order. **Idem** ---------- 771

REAL ESTATE AGENTS—See "Brokers."

RECORD—See "Appeal and Error."

REFERENCE—See "Appeal and Error," 40; "Equity."

REMOVAL OF CAUSES—See "Appeal and Error," 17.

Proceedings—Effect of Application. The question presented to the trial court when a petition for removal is filed, accompanied by proper bond, is one of law arising on the sufficiency of the petition, and, where the question of the right of removal arises out of the facts averred, the same cannot be tried in the state court; for jurisdiction to hear and determine this question is vested exclusively in the federal court to which removal is sought. **Chicago, R. I. & P. Ry. Co. v. Brazzell** ---------- 122

REPEAL—See "Statutes."

REPLEVIN—See "Appearance."

Special Ownership—Issues and Proof. Under a plea by an intervener in replevin of special ownership in property replevined, evidence that the intervener was the absolute owner was inadmissible. **International Bank of Bristow v. Bowser**---------- 316

REPLY—See "Pleading."

REVENUE—See "Taxation."

REVIEW—See "Appeal and Error."

ROADS—See "Highways."

S.

SALARIES—See "Clerks of Courts"; "Counties," 3; "Officers."

SALES—See "Brokers"; "Evidence"; "Fixtures"; "Frauds, Statute of"; "Guaranty"; "Guardian and Ward"; "Limitation of Actions"; "Public Lands"; "Vendor and Purchaser."

1. **Breach of Warranty—Burden of Proof.** Where the only defense to an action to recover the purchase price of gin machinery delivered to the defendant and used by him is that it failed to conform to certain express warranties made by plaintiff, the burden is not on the vendor to show that it met the warranties, but is on the defendant to show that the same failed so to do. **Bilby v. Thomas Gin-Compress Co.** ---------- 254

2. **Rescission—Requisites—Actions—Grounds and Conditions Precedent.** Where the evidence reasonably tended to show that the plaintiff returned to the defendants all the papers they received from them in relation to the sale of patent-right territory, and

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SALES—Continued.

disclaimed any further interest therein, long prior to the commencement of an action wherein the sale of said territory incidentally came into question, in a suit for purchase price of land, and that the enterprise had long been abandoned by all the parties to the transaction on account of defects in the patented article which made its sale impracticable, a more formal reconveyance of such territory was not necessary before the commencement of said action. **West & Russell v. Rawden**..... 399

SCHOOL FUND—See "Banks and Banking."

SCHOOL LANDS—See "Public Lands."

SCHOOLS AND SCHOOL DISTRICTS—See "Carriers," 16; "Colleges and Universities."

1. **Consolidated Districts—Two or More Counties.** Under Comp. Laws 1909, sec. 8170, consolidation of school districts comprising territory lying in more than one county is authorized. **Felkner v. Winningham**..... 204

2. **Same—Co-operation of County Superintendents.** Under Comp. Laws 1909, sec 8170, county superintendents of each of the counties in which school districts lie must act together in forming a consolidated district. **Idem**..... 204

3. **Same—Meetings of Voters of District.** County superintendents of each of the counties in which school districts to be consolidated lie must designate the time and place for meeting of the voters of said districts. **Idem**..... 204

4. **Same—Consolidation—Appeal.** Article 6, c. 45, p. 245, Sess. Laws 1895, being section 8080, Comp. Laws 1909, was not superseded or repealed by section 1 of article 5, c. 34, p. 271, Sess. Laws 1910, and appeal by persons aggrieved by the formation or alteration of school districts lying partly in two or more counties lies to the State Superintendent of Public Instruction and not to the board of county commissioners of either of the counties in which any portion of the said districts may be located. **Idem**.... 204
Woodard v. Strosnider..... 277

5. **Same—Consolidation in One County.** By virtue of section 1, c. 107, p. 202, Sess. Laws 1910, and section 8 of article 1, c. 33, Sess. Laws 1905 (section 8176, Comp. Laws 1909), a county superintendent is granted the power to change consolidated school districts in his county when the interests of the people thereof may require it by making them to conform to existing topographical or physical conditions, and an appeal lies from the action of such county superintendent to the board of county commissioners. **Board of Com'rs of Garfield Co. v. Worrell**..... 390

6. **Alterations of District—Apportionment of Liability.** Where part of the territory of one school district is annexed to another, unless some provision is made by law respecting the property and existing liabilities, the property within the detached territory belongs to the municipality to which it is attached; and each is responsible for the debts contracted by it prior to the change. **Consol. School Dist. No. 1, Alfalfa Co., v. School Dist. No. 24**..... 320

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SCHOOLS AND SCHOOL DISTRICTS—Continued.

7. **Clerk of District—Vacancy—Appointment—Mandamus.** A certificate of appointment to the office of clerk of a school district to fill a vacancy caused by resignation, to continue until a successor is elected, signed by the county superintendent, entitles the appointee to mandamus against one claiming under an unauthorized election, and a certificate issued pursuant thereto, to recover the paraphernalia of the office. **Jewitt v. West**..... 703

SENTENCE—See "Criminal Law."

SERVANTS—See 'Master and Servant."

SERVICE BY PUBLICATION—See "Process"; "Publication."

SEWERS—See "Municipal Corporations," 1-5.

SEX—See "Clerks of Courts."

SHERIFFS AND CONSTABLES:

1. **Liability—Amercement.** Under Comp. Laws 1909, sec. 5997, when a sheriff fails to make return of a writ of execution, as required by statute, the court must amerce him whether his omission results from willful wrong or mere neglect, and whether it has resulted in actual injury or not. **Henderson-Sturges Piano Co. v. Smith** 335

2. **Action on Bond—Parties.** The state is a proper party plaintiff in an action upon the official bond of a sheriff to recover the penalties prescribed by sections 3371, 3372, and 3373, Comp. Laws 1909. **State v. Rader**..... 350

SIGNATURES—See "Guaranty."

SPECIFIC PERFORMANCE:

Performance of Agreement to Support. Performance by plaintiff of agreement to support her father and stepmother during their natural lives held to entitle her to specific performance of their agreement to devise land to her, notwithstanding objection of their heirs. **Purcell v. Corder**..... 68

STATES—See "Sheriffs and Constables."

1. **Action Against—Parties.** Suits against officers of a state as representing the state in action and liability, and in which the state, although not a party to the record, is the real party against which relief is sought, and in which a judgment for plaintiff, although nominally against defendant as an individual, could operate to control the action of the state or subject it to liability, are suits against the state. **Love v. Filtsch**..... 131

2. **Same.** A proceeding in mandamus brought for the purpose of requiring the auditing and allowance of a disputed claim for rent growing out of a private contract between the state and parties owning property occupied by state officials, is an action brought against the state, and cannot be maintained except with its consent. **Idem** 131

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STATES—Continued.

3. **Indebtedness—Constitutional Limitations.** Limitations of Williams' Const. art. 10, sec. 23, relating to state indebtedness, do not apply to debts arising out of the ordinary current expenses of the state government, payable out of current yearly revenues, and other resources for the fiscal year in which the obligations were incurred. **In re Application of State to Issue Bonds to Fund Indebtedness** ---------- 797

4. **Same—Deficiencies.** Const. art 10, sec. 3, providing for the payment of deficiencies of state revenue which may arise during any fiscal year, where the ordinary expenses exceed the income from current taxation and other sources, is not exclusive. **Idem**---- 797

5. **Warrants—Refunding—Bonds.** Comp. Laws 1909, secs. 372-381, furnish the authority and procedure for refunding outstanding legal warrants of state indebtedness. **Idem**---------- 797

6. **Same—Statutes—Repeal.** Comp. Laws 1909, secs. 372-381, in so far as they relate to refunding legal warrants of state indebtedness, were not repealed by implication by subsequent enactment of sections 408-421, inclusive. **Idem**---------- 797

7. **Same—Description of Bonds.** Comp. Laws 1909, sec. 377, governs the time and manner of payment of bonds of the state issued to refund warrants issued in payment of ordinary current expenses in maintaining the state government, which exceeded the revenue derived from taxation and other sources. **Idem**---------- 797

STATE SCHOOL FUND—See "Banks and Banking."

STATE SCHOOL LANDS—See "Public Lands."

STATUTE OF FRAUDS—See "Frauds, Statute of."

STATUTES—See "Animals"; "Appeal and Error"; "Banks and Banking"; "Bills and Notes"; "Breach of Marriage Promise"; "Bridges"; "Clerks of Courts"; "Constitutional Law"; "Counties"; "Courts"; "Criminal Law"; "Divorce"; "Ejectment"; "Eminent Domain"; "Guardian and Ward"; "Highways"; "Indians"; "Insane Persons"; "Judgment"; "Justices of the Peace"; "Limitation of Actions"; "Mandamus," 5, 7; "Municipal Corporations"; "Officers"; "Partnership"; "Principal and Surety"; "Railroads"; "Schools and School Districts"; "Sheriffs and Constables"; "States"; "Taxation"; "Telegraphs and Telephones"; "Trusts"; "Witnesses."

1. **Construction—General Rules.** Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or ambiguity, to favor public convenience, and to oppose all prejudice to public interest. **McGannon v. State ex rel.** ---------- 145

2. **Construction of Tax Laws.** In construing tax laws, where there is any ambiguity or doubt, it must be resolved in favor of the person upon whom it is sought to impose the burden. **Idem**---------- 145

3. **Inheritance Taxes—Constitutionality.** Act May 26, 1908 (Laws 1908, c. 81, art. 11), relating to inheritance taxes, is not violative of Const. art. 5, sec. 46, relating to local or special laws. **Idem** 145

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STATUTES—Continued.

4. **County Superior Courts—Juries—Constitutionality.** Act March 6, 1909 (Laws 1909, c. 14, art 7) creating a county superior court in certain counties, and by section 2 conferring jurisdiction on the superior courts in misdemeanor cases, is not invalidated as to such section by the invalidity of section 6, providing that misdemeanor cases be tried by a jury of six instead of twelve. **Ex parte Anderson** ---- 216
Ex parte Lightle ---- 223
Ex parte Rial ---- 224
Ex parte Spurlock ---- 225

5. **Same.** Said act is not violative of Const. art. 5, sec 46y, forbidding the passage of any local or special law authorizing the summoning or empaneling of grand or petit juries. **Idem** 216, 223, 224, 225

6. **Same.** Said act is not repugnant to Const. art 5, sec. 59, requiring laws of a general nature to have a uniform operation throughout the state. **Idem**---- 216, 223, 224, 225

7. **Initiative Petitions—Hearings—"Will."** "Will," in Act March 18, 1911 (Laws 1910-11, c. 107) sec. 1, amending Sess. Laws 1910, c. 66, art. 1, sec. 2, providing that the Secretary of State will, under circumstances stated, hear testimony and arguments as to the sufficiency of an initiative petition, means "shall" and is mandatory. **Russell v. Harrison**---- 225

8. **Construction—Mistakes.** Where words have been erroneously used in a statute and the context affords the means of correction, the proper words will be deemed substituted. **Schaffer v. Com'rs of Muskogee Co.** ---- 288

9. **Title of Act—Sufficiency.** Act March 19, 1910 (Laws 1910, c. 69), relating to county and district offices, was not invalid as embracing more than one subject. **State v. Harper**---- 572

10. **Repeal—Implication.** A subsequent statute dealing fully with part of the subjects embraced in a former one, and not mentioning the other subjects, does not repeal the former statute as to them. **In re Application of State to Issue Bonds to Fund Indebtedness** 797

STOCK—See "Animals."

STOLEN PROPERTY—See "Limitation of Actions."

STREET RAILROADS—See "Carriers."

SUCCESSION—See "Descent and Distribution"; "Dower"; "Indians."

SUMMONS—See "Appeal and Error," 11; "Appearance"; "Judgment"; "Process."

SURETYSHIP—See "Principal and Surety."

T.

TAXATION—See "Counties"; "Highways"; "Municipal Corporations"; "States"; "Statutes," 2. 3.

1. **Inheritance Tax.** Act May 26, 1908 (Laws 1908, c. 81, art. 11), imposing a tax on inheritance, is a tax on the transitus of the property, and not upon the property. **McGannon v. State**---- 145

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TAXATION—Continued.

2. **Same—Constitutionality.** Act May 26, 1908 (Laws 1908, c. 81, art. 11), being a tax on the transitus of the property, is not violative of Const. art. 10, sec. 6, relating to exemptions from taxation. **Idem** 145

3. **Same.** Act May 26, 1908 (Laws 1908, c. 81, art. 11), relating to inheritance taxes, is not violative of Const. art. 10, sec. 5, requiring uniformity of taxation. **Idem** 145

4. **Same.** Const. art. 10, sec. 19, requiring every act levying a tax to specify its purpose, does not apply to Act May 26, 1908 (Laws 1908, c. 81, art. 11), imposing inheritance taxes, but only to annually recurring taxes. **Idem** 145

5. **Rate of Inheritance Tax.** Under Comp. Laws 1909, secs. 7713, 7714, the rate of inheritance tax on all in excess of $5,000 in class 1 is 1 1-125 per cent. **Idem** 145

6. **Allotments—Exemption from Taxation.** Cherokee allottees, by virtue of the Cherokee Agreement, under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by the United States Constitution, fifth amendment, from abrogation during that period, as was attempted by the act of May 27, 1908 (35 St. at L. 312, c. 199), removing the restrictions upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation. **Whitmire v. Trapp** 429

TELEGRAPHS AND TELEPHONES:

1. **Uniform Telephone Rates—Orders of Corporation Commission.** It being shown that the owner of a telephone exchange charged certain subscribers $1 per month for residence phones and $2 per month for business phones and other subscribers $1.25 per month for residence phones and $2.50 per month for business phones, an order of the Corporation Commission that the higher charge be discontinued and that all persons be charged at the same rate was without error. **Hine v. Wadlington** 173

2. **Same—Appeal—Jurisdiction.** Where the owner of a telephone exchange appealed from an order of the Corporation Commission entered on the petition of a subscriber as to rates charged, and the Supreme Court subsequently granted an application that the record of another proceeding before the commission on petition of the telephone owner be certified to the court to be considered on the hearing of the appeal from the former order, but no appeal was prosecuted from the latter order, the Supreme Court is without jurisdiction to review the latter order. **Idem** 173

3. **Telephone Rates—Regulation by Cities.** Power of an incorporated city or town to fix municipal telephone rates can only be derived from the Legislature by express grant or by necessary implication. **Pioneer Telephone & Telegraph Co. v. State** 724

4. **Same.** Wilson's Rev. & Ann. St. 1903, sec. 512, subd. 20, giving cities power to authorize the construction and maintenance of

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TELEGRAPHS AND TELEPHONES—Continued.

telephone wires, does not grant the power of fixing telephone rates. **Idem** ---------- 724

5. **Same.** Where a municipality, with no power to fix telephone rates, granted by ordinance under Wilson's Rev. & Ann. St. 1903, sec. 512, subd. 20, to a telephone company the right to occupy its streets, and also fixed telephone rates, such ordinance is to that extent void and is not protected by Const. art. 9, sec. 18, giving the Corporation Commission power to establish rates when power is not given municipality. **Idem**---------- 724

TENANCY—See "Landlord and Tenant."

TENDER—See "Judgment"; "Municipal Corporations," 5.

TITLE—See "Banks and Banking"; "Bills and Notes"; "Courts"; "Covenants"; "Fixtures"; "Forcible Entry and Detainer"; "Indians"; "Insurance"; "Quieting Title"; "Vendor and Purchaser."

TORTS—See "Breach of Marriage Promise"; "Indians," 5; "Master and Servant"; "Parent and Child."

TOWNS—See "Municipal Corporations," 9.

TOWNSHIPS—See "Bridges."

TOWN SITES—See "Counties," 15; "Indians," 9-11.

TRANSCRIPT OF RECORD—See "Appeal and Error."

TRIAL—See "Appeal and Error"; "Bills and Notes"; "Carriers," 5, 6; "Constitutional Law"; "Ejectment"; "Equity"; "Frauds, Statute of"; "Judgment"; "Justices of the Peace"; "Mandamus," 3, 6; "Pleading"; "Railroads"; "Removal of Causes"; "Replevin"; "Sales"; "Witnesses."

1. **Trial by Court—Demurrer to Evidence—Findings.** Overruling a demurrer to plaintiff's evidence on the trial of a cause to a court without a jury does not preclude it at the conclusion of all of the evidence from finding, on the whole case, that plaintiff had failed to sustain his cause. **Lynde-Bowman-Darby Co. v. Huff** 239

2. **Right to Open and Close—Waiver.** Where counsel on the trial of a cause failed at the time to demand the right to open and close the argument, error, if any, committed by the trial court in the procedure adopted is waived. **Idem**---------- 239

3. **Instructions—Objection.** An objection to oral instructions that the "defendant excepts to the giving of each instruction" is sufficient to preserve for review errors therein. **Baumle v. Verde** 243

4. **Instructions—Necessity for Requests.** Where instructions given are correct so far as they go, defendant could not complain of the court's failure to sufficiently present its defense; no additional instructions having been requested. **St. Louis & S. F. R. Co. v. Crowell** 773

TRUSTS—See "Banks and Banking"; "Clerks of Courts."

1. **Mingling Trust Funds.** Where a party mixes trust funds with his, the whole will be treated as trust property, except so far

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TRUSTS—Continued.

as it may be distinguished. **Fidelity & Deposit Co. of Maryland v. Rankin** 7

2. **Same—Misapplication.** Where a trustee transfers a trust fund to a bank with notice of his relation to it, an action to recover will lie in favor of the true owner against the bank. **Idem**..... 7

3. **Same.** Where a trustee transfers money to a bank with notice of the trust for a purpose foreign to the trust, the bank cannot hold it as against the true owner. **Idem**..... 7

4. **Express Trusts—Validity of Oral Trusts.** A pleading that is sufficient to withstand a demurrer under the statute of frauds is also sufficient under the statute of uses and trusts (section 7267, Comp. Laws 1909; section 4186, St. Okla. 1890). **Purcell v. Corder**..... 68

5. **Same—Performance.** Performance of an oral agreement which would take a case out of the operation of the statute of frauds will also take it out of the inhibitions of the statute of uses and trusts. **Idem** 68

6. **Constructive Trusts—Evidence—Statute of Frauds.** That an agent to sell real estate and his wife could not enforce performance by a purchaser of an agreement to convey to them an undivided interest in the land does not entitle them to invoke the statute of frauds to exclude parol evidence of the agreement, in an action to establish a constructive trust. **Ewing v. Ewing**..... 414

7. **Same—Fraud by Real Estate Broker.** An agent selling a tract, less a parcel of five acres with improvements, at a certain price, concealing the fact that the whole tract was offered at that price, and procuring a conveyance to his wife of the five acres, held a constructive trustee of the purchaser. **Idem**..... 414

U.

USAGES AND CUSTOMS—See "Customs and Usages.

V.

VENDOR AND PURCHASER—See "Brokers"; "Covenants"; "Deeds"; "Divorce"; "Fixtures"; "Guardian and Ward"; "Indians"; "Public Lands"; "Sales"; "Trusts"; "Witnesses."

Breach of Warranty—Recovery of Money Paid. In an action for the purchase money for lands conveyed under general warranty the title to which has wholly failed, the purchasers are entitled to recover any portion of the consideration paid. **Joiner v. Ardmore Loan & Trust Co.** 266

VERDICT—See "Appeal and Error"; "Judgment."

W.

WARRANTS—See "Counties"; "Guaranty"; "States."

WARRANTY—See "Covenants"; "Deeds"; "Evidence"; "Sales"; "Vendor and Purchaser"; "Witnesses."

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WATERS AND WATER COURSES—See "Injunction."

Injunction—Petition—Irrigation System. Petition for injunction to restrain action by state engineer and applicant for water rights on a certain stream until a survey could be made, and to show that refusal of injunction would be to destroy a long established expensive irrigation system, states a cause of action. **Gay v. Hicks** 67
Gay v. Wallace ---------- 68

WILLS—See "Indians," 2, 6, 7; "Specific Performance."

WITNESSES:

1. **Husband and Wife—Joint Parties.** Where the wife, jointly with her husband, signed certain deeds of warranty, conveying certain lands, which deeds were the evidence introduced tending to show in whom the title to said lands was vested, and in a suit for the purchase price and to foreclose a statutory vendor's lien, she joined her husband as party plaintiff, without objection, and the defendants prayed for a judgment against husband and wife on their cross-petition for breach of warranty, **held**, that the husband and wife were joint parties with a joint interest in the action, and that the wife, therefore, was competent to testify therein, under Comp. Laws 1909, sec. 5842. **West & Russell v. Rawden** ---------- 399

2. **Competency—Knowledge—Value.** A dealer in millinery goods, who knew the value of the goods in question by pricing them at the time she purchased them, was competent to testify as to their value. **St. Louis & S. F. R. Co. v. Crowell** ---------- 773

WOMEN—See "Clerks of Courts."

WORK AND LABOR—See "Master and Servant."

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